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No. 08-423

In The

Supreme Court of the United States

TIMOTHY AND ANDREA SPACHT, Individually and as Next Friend of N.S., a Minor,

Petitioners,

v.

DR. WENDY A. TROYER, DR. WILLIAM G. KEYES, DR. JAMES THOMSEN, DR. VERLIA GOWER,

Respondents.

On Petition For A Writ Of Certiorari To The Georgia Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a Georgia trial court judge has authority, on its own initiative, to dismiss a medical malpractice complaint on an issue that was forfeited by defendant when it was not raised in a motion to dismiss, depriving a plaintiff of full and fair notice and an opportunity to respond.

2. Whether the trial court or Court of Appeals erred in finding Dr. Schwartz's Affidavit insufficient, even under their own flawed procedural hearings.

3. Whether the Georgia Court of Appeals erred in concluding that an expert's testimony which is found to be inadmissible at trial under *Daubert* results in dismissal of the entire case when there is unrebutted expert testimony on the record.

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following list identifies all parties appearing here and before the Georgia Court of Appeals and Georgia Supreme Court:

Petitioners here and Appellants below are:

Spacht's as set forth in style of case.

Respondents here and Respondents below are:

Dr. Wendy A. Troyer, Dr. William G. Keyes, Dr. James Thomsen and Dr. Verlia Gower.

Dr. Theodore Brand and Dr. John Bleacher are not Respondents here but were parties to the proceedings below.

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OPINION BELOW

The Opinion of the Georgia Court of Appeals is reported at *Spacht v. Troyer*, 288 Ga. App. 898, 655 S.E. 2d 656 and is reprinted in the Appendix to this Petition at 1. The opinion of the trial court is not reported. It is reprinted in the Appendix to this Petition at 39. The Georgia Supreme Court's denial of the petition for certiorari is reprinted at the Appendix to this Petition at 64. The Georgia Supreme Court's denial of the Motion for Reconsideration is reprinted in the Appendix to this Petition at 65.

JURISDICTION

This petition for a writ of certiorari is filed within 90 days of the date of the Supreme Court of Georgia's denial of the motion for reconsideration herein. Jurisdiction is invoked and conferred by 28 U.S.C. §§ 1257, 2101(c) and 2104. The judgment is plainly final and is not subject to further review in the state courts.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourteenth Amendment to the U.S. Constitution provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of

citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .

O.C.G.A. § 24-9-67.1 provides:

(a) The provisions of this Code section shall apply in all civil actions. The opinion of a witness qualified as an expert under this Code section may be given on the facts as proved by other witnesses. The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing or trial. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

(b) If scientific, technical, or other specialized knowledge will assist the trier of fact in any cause of action to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise, if:

(1) The testimony is based upon sufficient facts or data which are or will be admitted into evidence at the hearing or trial;

(2) The testimony is the product of reliable principles and methods; and

(3) The witness has applied the principles and methods reliably to the facts of the case.

(c) Notwithstanding the provisions of subsection (b) of this Code section and any other provision of law which might be construed to the contrary, in professional malpractice actions, the opinions of an expert, who is otherwise qualified as to the acceptable standard of conduct of the professional whose conduct is at issue, shall be admissible only if, at the time the act or omission is alleged to have occurred, such expert:

(1) Was licensed by an appropriate regulatory agency to practice his or her profession in the state in which such expert was practicing or teaching in the profession at such time; and

(2) In the case of a medical malpractice action, had actual professional knowledge and experience in the area of practice or specialty in which the opinion is to be given as the result of having been regularly engaged in:

(A) The active practice of such area of specialty of his or her profession for at least three of the last five years, with sufficient frequency to establish an appropriate level of knowledge, as determined by the judge, in

performing the procedure, diagnosing the condition, or rendering the treatment which is alleged to have been performed or rendered negligently by the defendant whose conduct is at issue; or

(B) The teaching of his or her profession for at least three of the last five years as an employed member of the faculty of an educational institution accredited in the teaching of such profession, with sufficient frequency to establish an appropriate level of knowledge, as determined by the judge, in teaching others how to perform the procedure, diagnose the condition, or render the treatment which is alleged to have been performed or rendered negligently by the defendant whose conduct is at issue; and

(C) Except as provided in subparagraph (D) of this paragraph:

(i) Is a member of the same profession;

(ii) Is a medical doctor testifying as to the standard of care of a defendant who is a doctor of osteopathy; or

(iii) Is a doctor of osteopathy testifying as to the standard of care of a defendant who is a medical doctor; and

(D) Notwithstanding any other provision of this Code section, an expert who is a physician and, as a result of having, during at least three of the last five (5) years immediately preceding the time the act or omission is alleged to have occurred, supervised,

taught, or instructed nurses, nurse practitioners, certified registered nurse anesthetists, nurse midwives, physician's assistants, physical therapists, occupational therapists, or medical support staff, has knowledge of the standard of care of that health care provider under the circumstances at issue shall be competent to testify as to the standard of that health care provider. However, a nurse, nurse practitioner, certified registered nurse anesthetist, nurse midwife, physician's assistant, physical therapist, occupational therapist, or medical support staff shall not be competent to testify as to the standard of care of a physician.

(d) Upon motion of a party, the court may hold a pretrial hearing to determine whether the witness qualifies as an expert and whether the expert's testimony satisfies the requirements of subsections (a) and (b) of this Code section. Such hearing and ruling shall be completed no later than the final pretrial conference contemplated under *Code Section 9-11-16*.

(e) An affiant must meet the requirements of this Code section in order to be deemed qualified to testify as an expert by means of the affidavit required under *Code Section 9-11-9.1*.

(f) It is the intent of the legislature that, in all civil cases, the courts of the State of Georgia not be viewed as open to expert evidence that would not be admissible in other

states. Therefore, in interpreting and applying this Code section, the courts of this state may draw from the opinions of the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *General Electric Co. v. Joiner*, 522 U.S. 136 (1997); *Kumho Tire Co. Ltd. v. Carmichael*, 526 U.S. 137 (1999); and other cases in federal courts applying the standards announced by the United States Supreme Court in these cases.

O.C.G.A. § 9-11-9.1 provides:

(a) In any action for damages alleging professional malpractice against:

(1) A professional licensed by the State of Georgia and listed in subsection (g) of this Code section;

(2) A domestic or foreign partnership, corporation, professional corporation, business trust, general partnership, limited partnership, limited liability company, limited liability partnership, association, or any other legal entity alleged to be liable based upon the action or inaction of a professional licensed by the State of Georgia and listed in subsection (g) of this Code section; or

(3) Any licensed health care facility alleged to be liable based upon the action or inaction of a health care professional licensed by the State of Georgia and listed in subsection (g) of this Code section, the plaintiff shall be required to file with the complaint an affidavit

of an expert competent to testify, which affidavit shall set forth specifically at least one negligent act or omission claimed to exist and the factual basis for each such claim.

(b) The contemporaneous affidavit filing requirement pursuant to subsection (a) of this Code section shall not apply to any case in which the period of limitation will expire or there is a good faith basis to believe it will expire on any claim stated in the complaint within ten days of the date of filing the complaint and, because of time constraints, the plaintiff has alleged that an affidavit of an expert could not be prepared. In such cases, if the attorney for the plaintiff files with the complaint an affidavit in which the attorney swears or affirms that his or her law firm was not retained by the plaintiff more than 90 days prior to the expiration of the period of limitation on the plaintiff's claim or claims, the plaintiff shall have 45 days after the filing of the complaint to supplement the pleadings with the affidavit. The trial court shall not extend such time for any reason without consent of all parties. If either affidavit is not filed within the periods specified in this Code section, or it is determined that the law firm of the attorney who filed the affidavit permitted in lieu of the contemporaneous filing of an expert affidavit or any attorney who appears on the pleadings was retained by the plaintiff more than 90 days prior to the expiration of the period of limitation, the complaint shall be dismissed for failure to state a claim.

(c) This Code section shall not be construed to extend any applicable period of limitation, except that if the affidavits are filed within the periods specified in this Code section, the filing of the affidavit of an expert after the expiration of the period of limitations shall be considered timely and shall provide no basis for a statute of limitations defense.

(d) If a complaint alleging professional malpractice is filed without the contemporaneous filing of an affidavit as permitted by subsection (b) of this Code section, the defendant shall not be required to file an answer to the complaint until thirty (30) days after the filing of the affidavit of an expert, and no discovery shall take place until after the filing of the answer.

(e) If a plaintiff files an affidavit which is allegedly defective, and the defendant to whom it pertains alleges, with specificity, by motion to dismiss filed on or before the close of discovery, that said affidavit is defective, the plaintiff's complaint shall be subject to dismissal for failure to state a claim, except that the plaintiff may cure the alleged defect by amendment pursuant to *Code Section 9-11-15* within thirty (30) days of service of the motion alleging that the affidavit is defective. The trial court may, in the exercise of its discretion, extend the time for filing said amendment or response to the motion, or both, as it shall determine justice requires.

(f) If a plaintiff fails to file an affidavit as required by this Code section and the defendant raises the failure to file such an affidavit by motion to dismiss filed contemporaneously with its initial responsive pleading, such complaint shall not be subject to the renewal provisions of *Code Section 9-2-61* after the expiration of the applicable period of limitation, unless a court determines that the plaintiff had the requisite affidavit within the time required by this Code section and the failure to file the affidavit was the result of a mistake.

(g) The professions to which this Code section shall apply are:

(1) Architects;

(2) Attorneys at law;

(3) Audiologists;

(4) Certified public accountants;

(5) Chiropractors;

(6) Clinical social workers;

(7) Dentists;

(8) Dietitians;

(9) Land surveyors;

(10) Marriage and family therapists;

(11) Medical doctors;

(12) Nurses;

(13) Occupational therapists;

(14) Optometrists;

(15) Osteopathic physicians;

(16) Pharmacists;

(17) Physical therapists;

(18) Physicians' assistants;

(19) Podiatrists;

(20) Professional counselors;

(21) Professional engineers;

(22) Psychologists;

(23) Radiological technicians;

(24) Respiratory therapists;

(25) Speech-language pathologists; or

(26) Veterinarians.

STATEMENT OF THE CASE

On February 16, 2005, Act No. 1 of the 2005 Georgia General Assembly was signed into law, putting into place the most far-reaching legislative changes in Georgia's civil justice system since the passage of the Civil Practice Act in 1966. The act created a new code section designated O.C.G.A. § 24-9-67.1, which imposed conditions an expert was

required to meet in order to be allowed to testify in any civil action.

O.C.G.A. § 9-11-9.1 was amended as part of the same omnibus bill that enacted O.C.G.A. § 24-9-67.1. O.C.G.A. § 9-11-9.1 requires that an action for medical malpractice be accompanied by an affidavit of an expert competent to testify. An expert in a medical malpractice case must be competent under O.C.G.A. § 24-9-67.1(c) to give an affidavit as required under O.C.G.A. § 9-11-9.1.

A challenge to the sufficiency of an affidavit must be raised by the defendant to whom it pertains, with specificity, in a motion to dismiss. Prior to the amendment of O.C.G.A. § 9-11-9.1, the defendant was required to allege the defect with specificity in a motion to dismiss filed *contemporaneously* with their initial responsive pleading. O.C.G.A. § 9-11-9.1 as amended requires that the defendant allege the defect with specificity in a motion to dismiss filed *on or before the close of discovery*. Under both versions, Plaintiff is given a *mandatory* thirty (30) days from service of the *mandatory motion to dismiss* to cure the defect *as specified by the defendant* by amendment or response to the motion. The trial court's discretion is limited to extending the time for filing the amendment or response to the motion, or both.

O.C.G.A. § 9-11-9.1 does not give, and has never given, the trial court discretion to consider issues pertaining to the sufficiency of an affidavit when the issue is not timely raised by a defendant in a motion

to dismiss. An issue not timely raised by a defendant in a motion to dismiss is forfeited. *Tenet Healthcare Corp. v. Gilbert,* 277 Ga. App. 895 (2006).

In this medical malpractice case however, the trial court dismissed Petitioners' complaint for failure to state a claim for an insufficient affidavit on its own initiative, on an issue never raised by any of the respondents below, and incorrectly deciding the unraised issue. Petitioners were deprived of notice and an opportunity to respond as required under O.C.G.A. § 9-11-9.1 and as guaranteed by the United States Constitution. The first time that Petitioners had notice of the issue was in the trial court's order dismissing this case.

The trial court's sua sponte dismissal of Petitioners' complaint on an issue not before it clearly deprived Petitioners of full and fair notice and an opportunity to respond, and the flawed, incoherent and muddled reasoning of the trial court, which was subsequently affirmed by the Court of Appeals in its own flawed opinion, is astonishing, particularly because the Court of Appeals, which original three-judge (3) panel was in favor of reversal 2-1, affirmed the decision in the space of twenty-four (24) hours after adding four (4) judges as set forth as follows.

Under the procedures of the Court of Appeals, our judges sit in three-judge (3) panels. Cases are assigned to individual judges who author the proposed opinion and circulate it to the remaining two judges on the panel. If either of the two reviewing judges on

the panel has a different view from that of the author, such position is reduced to writing. If such writing would result in a different judgment line, the writing becomes a dissent and circulates "whole court." If the writing would not result in a different judgment line, then the writing becomes a "special concurrence" and the case does not circulate outside the panel.

The original three (3) judge panel had this case under consideration for seven (7) months. There was a dissent on the panel, 2-1 in favor of reversal. Because there was a dissent on the panel, four additional judges were added to the panel to create a seven (7) judge panel. In the space of twenty-four (24) hours, the four additional judges joined the original dissenting opinion and affirmed the trial court's sua sponte dismissal of this medical malpractice case.

The Court of Appeals ignored the explicit due process requirements under O.C.G.A. § 9-11-9.1. A challenge to the sufficiency of an expert affidavit must be raised by the defendant with specificity in a motion to dismiss. Plaintiff is then given thirty (30) days from service of the motion to dismiss to amend the affidavit or respond to the motion. The trial judge has discretion to extend the time to respond, but has no authority to dismiss a complaint for an insufficient affidavit sua sponte.

Furthermore, the tortured reasoning of the trial court does not authorize dismissal of this lawsuit. This is a case where clear medical malpractice was proven against the respondents. This is a case where

malpractice was established not only by the affidavit of Petitioners' expert, Dr. Schwartz but also the deposition testimony of N.S.'s treating physician, Dr. Kanter. But that was missed by the four (4) new Court of Appeals judges because they obviously did not read the entire record in twenty-four (24) hours.

Review is urgently needed, not only because Petitioners' due process rights have been violated, but because Petitioners deserve to have a meaningful review of this case. The trial court had no authority to dismiss this case on an issue not before it, but the Court of Appeals' decision to affirm within the space of twenty-four (24) hours, was ill-informed and incorrect, and has left Petitioners with no further recourse. Everything is on the line for Petitioners. Left undisturbed, the sua sponte dismissal that was affirmed by the Court of Appeals under 24-9-67.1 will inevitably lead to the unconstitutional application of O.C.G.A. § 24-9-67.1 and O.C.G.A. § 9-11-9.1 for other plaintiffs in Georgia.

A. Factual Background

This is a case where medical malpractice was proven against respondents. Petitioners' expert, Dr. Schwartz, is a board certified pediatric surgeon, qualified to testify by affidavit, and N.S.'s own treating physician, Dr. Kanter, has given a deposition on his behalf establishing medical negligence against the respondents. The testimony of Dr. Schwartz and

Dr. Kanter establishes a prima facie case against Respondents.

Petitioner N.S. was born with severe upper airway obstruction. The cause was unknown. A tracheostomy tube was placed in his throat so he could breathe. When he was two and a half (2½) months old, a CT scan of his neck was performed. The results definitively established the cause of his airway obstruction. N. was born with a vascular ring. The ring was encircling his trachea and esophagus causing him to be unable to breathe. All symptomatic vascular rings are surgically divided. This is the only form of treatment for a symptomatic vascular ring.

Respondents were N.S.'s physicians. None bothered to read the results of the CT scan. Dr. Keyes ordered the CT scan. He *admits* that he never bothered to read it. Dr. Troyer admitted N. into the hospital on the day of his CT scan. She *admits* that she never bothered to read the results. Dr. Thomsen kept in place an unnecessary tracheostomy tube because he *never* bothered to read his own patient's CT scan. Dr. Gower unnecessarily removed N.' salivary glands because she *never* bothered to read her own patient's CT scan.

As a result, N.S. lived with a tracheostomy tube in place 24 hours a day for the first two and a half (2½) years of his life. His salivary glands were removed, which will cause him problems for the rest of his life. None of it was necessary. If respondents had just reviewed the definitive results of the CT scan,

the diagnosis of a vascular ring would have been made and N. would have been referred to a surgeon for division of the vascular ring.

When N. was four (4) years old, his parents went to talk with Dr. Kanter, his cardiothoracic surgeon. Dr. Kanter is a board certified pediatric cardiothoracic surgeon, and chief of pediatric cardiothoracic surgery at Children's Hospital and tenured professor at Emory University School of Medicine. Dr. Kanter saved N.S.'s life and has testified on his behalf in this case.

Dr. Kanter testified that he ordered a CT scan to rule out the possibility of a vascular ring before he was to perform N.' heart surgery. (Deposition of Dr. Kanter p. 13). The radiologist informed Dr. Kanter that a CT scan had already been taken. Id. Dr. Kanter reviewed the "old CT scan" and diagnosed the vascular ring immediately. (Deposition of Dr. Kanter p. 14). In fact, Dr. Kanter testified that "I think that that report is screaming out vascular ring." (Deposition of Dr. Kanter p. 24).

Dr. Kanter surgically divided the vascular ring, based on the CT scan that had been performed years earlier. (Deposition of Dr. Kanter p. 33). Dr. Kanter testified that N.' respiratory problems were related to the vascular ring and opined that N. would not have ever needed a tracheotomy if he had the vascular ring relieved. (Depo. p. 34). Of course, because none of the doctors bothered to read the CT scan, the diagnosis

was missed until Dr. Kanter reviewed the "old CT scan" and made the diagnosis years later.

According to Dr. Kanter, a physician must review the tests that he orders for a patient. (Depo. p. 22). Here, Dr. Keyes ordered the "old CT scan" for N., but never bothered to review it. Dr. Kanter opined that the failure to review the results of a diagnostic test is a deviation of the standard of care. (Depo. p. 29). Therefore, Dr. Kanter established that Dr. Keyes was negligent in failing to review the results of a test that he ordered. Dr. Kanter further opined that a physician must review the diagnostic tests of his patient and must familiarize himself with the child's conditions. (Depo. p. 24). Here however, Dr. Troyer, Dr. Thomsen and Dr. Gower all failed to review the "old CT scan" for N.S., and therefore the diagnosis of a vascular ring was missed. Dr. Kanter testified that there is no reason that this diagnostic test should not have been discovered and reviewed when taken. (Depo. p. 36-37). Therefore, Dr. Kanter established medical negligence on behalf of Drs. Troyer, Thomsen, Keyes and Gower. Dr. Kanter testified that the tracheotomy would never have been needed had the vascular ring been relieved. (Depo. p. 34).

Petitioners' medical malpractice complaint was filed contemporaneously with the Affidavit of Dr. David Schwartz in accordance with O.C.G.A. § 9-11-9.1 and 24-9-67.1. Dr. David Schwartz is a board certified Pediatric Surgeon and Fellow of the American College of Surgeons and American Academy of

Pediatrics, having received his M.D. degree from Albert Einstein School of Medicine and having performed his pediatric surgery residency and fellowship at Johns Hopkins Hospital. Dr. Schwartz has actively practiced as a pediatric surgeon continuously for more than thirty-five (35) years. Dr. Schwartz testified in his affidavit that as a pediatric surgeon, he manages surgical problems in children every day. He testified that he has the training, knowledge, and experience to diagnose and surgically manage children with vascular rings. Based on his expertise as a pediatric surgeon, Dr. Schwartz opined (1) Dr. Troyer and Dr. Keyes failed to review the results of N.S.'s March 12, 2003 CT scan which definitely established that N.S. suffered from a vascular ring. (R-31-33; R-1298-1307). (2) Dr. Gower negligently failed to review the March 12, 2002 CT which definitely established that N.S. suffered from a vascular ring. As a result, she unnecessarily removed N.S.'s salivary gland. Id. (3) Dr. Thomsen kept in place an unnecessary tracheotomy. The tracheotomy would have been avoided if Dr. Thomsen diagnosed the vascular ring. Id.

The Respondents filed motions to dismiss for an insufficient affidavit on the sole issue of whether Dr. Schwartz was required to practice in the same specialty as them under 24-9-67.1(c)(2) to be competent to testify by affidavit under 9-11-9.1. His competence as a pediatric surgeon, the basis for his opinions and the reliability of his testimony, was never challenged by any party to the lawsuit.

O.C.G.A. § 24-9-67.1(c)(2) requires that an expert testifying in a medical malpractice case have "actual professional knowledge and experience in the area of practice or specialty in which the opinion is to be given." Respondents argued that this language required the expert to be a specialist in the same specialty as the defendant doctor. Dr. Keyes and Dr. Troyer are neonatologists. They argued that Dr. Schwartz was not competent under O.C.G.A. § 24-9-67.1(c) because he was not a neonatologist. Dr. Thomsen and Dr. Gower are pediatric otolaryngologists. They argued that Dr. Schwartz was not competent under O.C.G.A. § 24-9-67.1(c) because he was not a pediatric otolaryngolgist.

On July 28, 2006, the trial court judge entered a fifteen (15) page Order reserving ruling on the issues raised by respondents in their Motions to Dismiss. The trial court opined that it could not determine from the record whether Dr. Schwartz was qualified due to all the various specialties and subspecialties involved. The trial court cited to *Milligan v. Manno*, 197 Ga. App. 171 (1990), which held that as a general rule, a member of a school of practice other than that to which defendant belongs is not competent to testify as an expert, and to *Sandford v. Howard*, 161 Ga. App. 495 (1982), which held that an exception to the general rule existed where there was proof that the methods of treatment were the same despite the different schools involved, and determined it would conduct a hearing under O.C.G.A. § 24-9-67.1(d) to determine whether Dr. Schwartz was competent to

testify against the defendant doctors despite the different specialties involved.

The trial court's pre-hearing Order was wrong in four fundamental ways, even though a ruling had not yet been made.

First, *Milligan v. Manno*, 197 Ga. App. 171 and *Sandford v. Howard*, 161 Ga. App. 495 were no longer good law. Exactly twenty-two (22) days before the pre-hearing order had been entered, the Court of Appeals decided *Cotten v. Phillips,* 280 Ga. App. 280, 633 S.E. 2d 655 (2006), which made clear that the language in 24-9-67.1(c) did not require that an expert practice in the same specialty as the negligent defendant doctor or make a showing of similar treatment. The Court held that O.C.G.A. § 24-9-67.1(c)

> "simply requires that an expert have actual professional knowledge and experience in the area of practice/specialty in which his expert opinion is to be given. It appears that the legislature has allowed for an overlap in specialties, whereby an otherwise qualified medical doctor belonging to 'Specialty A' can render an opinion about the acts or omissions of another medical doctor belonging to 'Specialty B' – so long as the opinion of the expert witness belonging to 'Specialty A' pertains to Specialty A. . . . "

Under the *Cotten v. Phillips* decision, the Spacht's were not required to prove that the methods of treatment were the same for their expert and the defendant doctors. The expert was simply required to

have experience in the area in which his opinion was given. Here, Dr. Schwartz gave an opinion in the area of pediatric surgery and he is a qualified and experienced pediatric surgeon. A vascular ring is a surgical problem that affected a pediatric patient in this case. He is the doctor that respondents should have referred N. to for division of the ring. He testified in his affidavit that he has been in private practice as a pediatric surgeon for over thirty (30) consecutive years and has been diagnosing and surgically managing vascular rings for over thirty (30) years. Clearly, he has knowledge and experience in the area of practice in which his opinion was given.

Second, the issue raised by respondents was rendered moot by *Cotten v. Phillips*. A hearing should not have been scheduled or conducted. The sole issue raised by respondents in their motions to dismiss was moot and there were no other issues pending before the court. The Motions to Dismiss should have been denied, not reserved.

Third, O.C.G.A. § 24-9-67.1(d) hearings are evidentiary hearings based on *Daubert* principles of reliability and scientific validity. There were no *Daubert* issues before the Court. The hearing was simply a hearing on the Motions to Dismiss based on the sole issue raised by respondents.

Fourth, under O.C.G.A. § 24-9-67.1(d), a *Daubert* hearing must be requested on motion of a party. No motion for a *Daubert* hearing under O.C.G.A. § 24-9-67.1(d) was filed by any party in this case.

To point out that the issue was moot and to further assist the court, Petitioners filed a motion to supplement and the supplemental Affidavit of Dr. Schwartz on September 18, 2006. The motion to supplement informed the court that an expert was not required to have knowledge and experience in or to actively practice in the same area of practice or specialty as that of the defendant doctor. *Cotten v. Phillips*, 280 Ga. App. 280, 633 S.E. 2d 655 (2006). This rendered the sole issue raised by defendants in their motions moot.

The Affidavit of Dr. Schwartz was also supplemented to include the scope of his knowledge and experience as a pediatric surgeon. Specifically, Dr. Schwartz testified that as a pediatric surgeon, he operates on children whose development ranges from the newborn stage to the teenage years. He testified that as a pediatric surgeon, he is primarily concerned with the diagnosis, preoperative, operative, and postoperative management of surgical problems in children. He testified that as a board certified pediatric surgeon, he has the training, knowledge and experience to diagnose and surgically manage children with vascular rings. He testified that every day he cooperates with all of the specialists involved in a child's medical care to determine whether surgery is the best option.

He testified that he regularly cooperates with neonatologists and pediatric otalyrngologists to manage surgical problems in children. He testified that a child with a vascular ring must be diagnosed

immediately by a neonatologist and or pediatric otolaryngologist and then they must refer the child to a pediatric surgeon so that the pediatric surgeon may immediately evaluate the child for surgical division of the ring.

Respondents presented no evidence to contradict the affidavit testimony of Dr. Schwartz. Dr. Schwartz's testimony that he has the training, knowledge and experience to diagnose vascular rings was unrebutted.

On September 21, 2006, the matter came before the Honorable Judge Roach, a DeKalb County Magistrate Court Judge, (specially designated by the Honorable Judge Gail Flake to sit as Superior Court Judge at the hearing). Both sides presented argument on the sole issue that was outlined by the order dated July 28, 2006. To wit: whether O.C.G.A. § 24-9-67.1(c)(2), which reads in relevant part, *actual professional knowledge and experience in the area of practice or specialty in which the opinion is to be given* requires that a medical malpractice expert practice in the same area of practice or specialty as the defendant doctor. Again, Judge Roach was informed of the recent *Cotten v. Phillips* decision which rendered this issue moot. She was also informed of a second decision on this issue, *Abramson v. Williams*, 281 Ga. App. 617, S.E. 2d 765 (2007), which had been decided only the day before the hearing. The cases rendered the motions moot.

B. Proceedings Below

On December 26, 2006, Judge Roach granted the Respondents' Motions to Dismiss on issues NEVER raised by Respondents' in their Motions to Dismiss, or by either party at the hearing on the Motions to Dismiss on September 21, 2006.

Judge Roach ignored Dr. Schwartz's Affidavit testimony that he had knowledge and experience in diagnosing and surgically managing vascular rings, and held that Dr. Schwartz's area of expertise exists not in diagnosing vascular rings, but with their surgical remediation after diagnosis by another differently qualified professional. Judge Roach then dismissed the complaint finding that Dr. Schwartz's Affidavit failed to show that he had diagnosed a vascular ring on a specific date within five (5) years of March 12, 2002, the date of N.S.'s CT scan. (R-1348-1362). This sua sponte dismissal, on an issue never raised by respondents in their motion to dismiss, or argued at the hearing on the motion to dismiss, was an egregious violation of Petitioners' right to due process of law, and was completely and totally erroneous.

On December 10, 2007, Petitioners filed a Motion for Reconsideration. The Motion for Reconsideration was denied on December 14, 2007. Petitioners filed a Notice of Intent to Petition for a Writ of Certiorari with the Court of Appeals on December 21, 2007. The Georgia Supreme Court denied certiorari on May 19,

2008, with two of seven justices dissenting. Petitioners filed a Motion for Reconsideration in the Georgia Supreme Court on May 29, 2008. The Motion for Reconsideration was denied on June 30, 2008, with the same two justices dissenting.

C. When Constitutional Issue Raised

Petitioners preserved their due process argument in the Georgia Court of Appeals. Petitioners preserved their arguments regarding the exclusion of Dr. Schwartz's opinion as opposed to Dismissal of the case in the Georgia Court of Appeals. These issues were again raised in the Motions for Reconsideration and the Petition for Cert to the Georgia Supreme Court.

REASONS FOR GRANTING CERTIORARI

This case presents an exceptional violation of Petitioners' due process rights to full and fair notice and an opportunity to respond. The trial court dismissed Petitioners' case for failure to state a claim, on its own initiative, on an issue not before it, that had been forfeited by respondents when not raised with specificity in a motion to dismiss as required under Georgia law. The trial court has no discretion to dismiss a medical malpractice case for an insufficient affidavit on an issue waived by a defendant.

Furthermore, it can hardly be said that the Petitioners' medical malpractice complaint was so frivolous so as to warrant dismissal for failure to state a claim, especially on the trial court's own initiative, at the pleading stage. The Complaint was filed contemporaneously with the Affidavit of Dr. Schwartz, a board certified pediatric surgeon with over thirty (30) continuous years of experience in private practice as a pediatric surgeon and associate professor of pediatric surgery. Dr. Schwartz's testimony pertained to his expertise in pediatric surgery.

The Court of Appeals decision to affirm the trial court's sua sponte dismissal for failure to state a claim will inevitably lead to the unconstitutional application of 24-9-67.1(c) in the State of Georgia. The Court of Appeals' determination that notice was provided by the trial court because of the one line sentence indicating that a 24-9-67.1(d) hearing in a fifteen (15) page order which clearly had nothing to do with the *Daubert* 24-9-67.1(d) hearing would be conducted is notice of nothing. A hearing under 24-9-67.1(d) relates to *Daubert* hearings and a *Daubert* hearing was never conducted in this case. However, even *if a Daubert hearing was conducted in this case as contemplated by O.C.G.A. § 24-9-67.1(d), (which it clearly was not) and Dr. Schwartz's testimony was erroneously found to be inadmissible under a Daubert analysis, his opinion would merely be excluded at trial. This finding does not reach the merits of the case. The entire case would not be subject to dismissal*

based on the exclusion of Dr. Schwartz's testimony at trial.

Petitioners deserve a meaningful review of this case. Petitioners' due process rights were violated by the trial court's sua sponte dismissal of their complaint, and the Court of Appeals affirmance in the space of twenty-four (24) hours. This Court has granted certiorari to review decisions based on state law when the harm is particularly egregious. See *BMW of North America v. Gore,* 517 U.S. 559 (1996). This is such a case. N.S. has proven medical negligence against Respondents. Nevertheless, the trial court dismissed the case sua sponte for failure to state a claim. N.S. had no notice and was given no opportunity to respond. The Court of Appeals affirmed the decision in the space of twenty-four (24) hours and clearly did not conduct a meaningful review of the case. Finally, Dr. Schwartz's Affidavit clearly passed muster even under the erroneous procedure followed in this case.

I. The trial court's sua sponte dismissal of Petitioners' complaint deprived Petitioners of notice and an opportunity to respond.

In this case, the only issue raised by respondents in their motions to dismiss was that the Affidavit of Dr. Schwartz was defective because he was not a specialist in the same area of practice. This was the only issue that Petitioners were put on notice of. This

was the only issue raised by Respondents. This issue was decided adversely to respondents in *Cotten v. Phillips*, and *Abramson v. Williams*, 281 Ga. App. 617, 636, S.E. 2d 765 (2007) and Respondents' motions to dismiss were moot.

The trial court's sua sponte dismissal on the issue of when Dr. Schwartz diagnosed a vascular ring within three years of 2002 was never raised by defendants in their motions to dismiss, briefed by the parties, or orally argued at the hearing on defendants' motions to dismiss.

The Court of Appeals should have seized on this opportunity to correct such a blatant wrong that had been committed in the lower court. A review of the record revealed that the issue raised by respondents was rendered moot, the issue was moot when the trial court entered her pre-hearing order citing cases that were no longer good law, the trial court's sua sponte dismissal violated Petitioners' rights to due process of law under O.C.G.A. § 9-11-9.1, and the reasoning behind the dismissal itself was flawed because Dr. Schwartz's Affidavit testimony that he had experience diagnosing and surgically managing vascular rings was unrebutted. The trial court ignored the affidavit testimony, and found instead that his expertise existed in the surgical remediation of a vascular ring, not in the diagnosis of a vascular ring, and dismissed the case sua sponte, never giving Petitioners an opportunity to respond to this issue, which was never raised in this case.

Obviously, the additional four (4) Court of Appeals judges did not review the record because the decision was affirmed within the space of twenty-four (24) hours, which is clearly not enough time to make an informed decision on this voluminous record.

The Court of Appeals affirmed and held that the trial court's pre-hearing order gave Petitioners notice of the issue to be determined because of the one line sentence indicating that a 24-9-67.1(d) hearing would be conducted, to decide the moot overlap issues the trial court discussed in the fifteen (15) page pre-hearing order.

This one sentence discussion of notice is inaccurate and describes nothing. O.C.G.A. § 24-9-67.1(d) hearings pertain to *Daubert* investigations and must be requested on motion by a party, not the court. No party moved for a hearing pursuant to O.C.G.A. § 24-9-67.1(d). There was no motion by any party in this case for a *Daubert* investigation into the trial admissibility of Dr. Schwartz's opinions. No party briefed the *Daubert* issues in this case. No party orally argued any *Daubert* issues in this case at the hearing on respondents' motions to dismiss. Most obviously and most importantly, the trial judge did not make a *Daubert* decision or determination or analysis or review or consideration in any way shape or form in her order in this case.

The only hearing that was conducted was on respondents' motion to dismiss on the issue of whether an expert testifying by affidavit in a medical

malpractice case was required to be a specialist in the same field as the defendant doctors which was already moot by the time of that hearing.

II. The Court of Appeals found that the trial court did not err in its conclusion that Dr. Schwartz was not competent to give an affidavit in this case. Specifically, the Court of Appeals found that the record was silent as to when within the last thirty years Dr. Schwartz had diagnosed the condition at issue. However, Dr. Schwartz's Affidavit testimony is more than sufficient to qualify him under any standard, even under the tortured reasoning of the trial court and the Court of Appeals

Dr. Schwartz testified that he is involved every day in determining whether a child needs surgery. Dr. Schwartz testified that he has been diagnosing and surgically managing vascular rings for over 30 years, which is sufficient to satisfy O.C.G.A. § 24-9-67.1 pursuant to every single Court of Appeals decision that has interpreted an expert's qualifications under the statute. See *Mays v. Ellis*, 283 Ga. App. 195, 647 S.E. 2d 201 (2007), *MCG Health v. Barton*, 285 Ga. App. 577, 647 S.E. 2d 201 (2007), *Cotten v. Phillips*. 280 Ga. App. 280, 633 S.E. 2d 655 (2006), *Abramson v. Williams*, 281 Ga. App. 617, 636, S.E. 2d 765 (2007).

In *Abramson v. Williams,* Plaintiff's medical malpractice Complaint was based on the negligent

failure to diagnose a broken hip. Plaintiff's expert, Dr. Tatum testified "I am in active practice of orthopedic medicine and have been continuously so for more than 30 years." This was deemed sufficient. Dr. Tatum was not required to provide specific dates or details regarding when he diagnosed a broken hip in order to be deemed competent to testify regarding the failure to diagnose a broken hip. *Supra.*

In *MCG Health v. Barton, supra*, Barton filed a malpractice action alleging that his treating physicians negligently delayed treatment which resulted in the loss of a testicle. Attached to his Complaint, was the Affidavit of Dr. Britenburg, an emergency room physician with over 20 years of emergency room experience. Defendant filed a motion to exclude and for summary judgment arguing that Dr. Britenburg was not qualified to testify based on his affidavit and deposition testimony. In his affidavit, Dr. Britenburg testified that "deponent is a licensed and practicing physician in the State of South Carolina and has for twenty four years practiced medicine as a staff physician at the Anderson Area Medical Center, Emergency Dept." During Dr. Britenburg's deposition, he was asked the last time he treated a testicular injury. He testified "I couldn't tell you. . . . In my career I've maybe treated a couple dozen testicular torsions . . . maybe a dozen or two (2)." The Court of Appeals held that the testimony of Dr. Britenburg, a licensed physician with over 20 years of emergency room experience was qualified to testify on behalf of the

plaintiff regarding the delayed diagnosis of a testicular injury.

Certainly if Dr. Tatum was qualified to give an affidavit in a medical malpractice case involving the failure to diagnose a broken hip without setting forth the dates that he diagnosed a broken hip, and if Dr. Britenburg was qualified to give an opinion in a medical negligence case involving a delayed diagnosis, without offering specific dates as to when he diagnosed a testicular torsion, Dr. Schwartz's Affidavit testimony, that he determines whether surgery is the best option for a child every day and has diagnosed and surgically managed vascular rings for the last 30 years is more than sufficient to qualify him as an expert under any standard. No discretion is broad enough to countenance such contrary findings in the Court of Appeals decisions.

It is nonsensical, wrong, unjust and incorrect for the Court of Appeals to approve the testimony of Dr. Tatum and Dr. Britenburg and then say that Dr. Schwartz's testimony does not pass muster. For the Court of Appeals to approve the testimony of Dr. Tatum as having sufficient knowledge regarding the failure to diagnose a broken hip when Dr. Tatum's Affidavit was completely silent as to when he made a diagnosis of a broken hip; and approve the testimony of Dr. Britenburg as having sufficient knowledge regarding testicular torsion cases when Dr. Britenburg's testimony was that he has seen 12-24 such cases in his 26 year history (which means on the low end less than ½ case per year); and then reject the

affidavit testimony of Dr. Schwartz regarding the missed diagnosis of a vascular ring when he has averred in his affidavit that he has dealt with the diagnosis, surgical management, and care of vascular ring pediatric patients *daily* for the past 32 consecutive years is wholly inconsistent and absolutely wrong.

III. If a *Daubert* hearing was conducted, the Court of Appeals erred in concluding that an expert's testimony which is found to be inadmissible at trial under *Daubert* results in dismissal of the case when there is unrebutted expert testimony on the record.

Even if a Daubert hearing was conducted in this case as contemplated by O.C.G.A. § 24-9-67.1(d), and Dr. Schwartz's testimony was erroneously found to be inadmissible under a Daubert analysis, his opinion would merely be excluded at trial. This finding does not reach the merits of the case. The entire case would not be subject to dismissal based on the exclusion of Dr. Schwartz's testimony at trial.

This is a case where N.S.'s own treating physician has given deposition testimony on his behalf. Dr. Kanter, a board certified pediatric cardiothoracic surgeon, and chief of pediatric cardiothoracic surgery at Children's Hospital and tenured professor at Emory University School of Medicine, has established medical negligence against the Respondent doctors.

Therefore, even based on the Court of Appeals erroneous reasoning, dismissal of this action was improper. If the trial court conducted a *Daubert* hearing as determined by the Court of Appeals, and Dr. Schwartz's testimony was found to be insufficient based on *Daubert*, his testimony would merely be excluded at trial. The Complaint would not be dismissed. The trial court has discretion to admit or exclude testimony at trial based on *Daubert*. The trial court does not have discretion to dismiss a complaint based on its discretionary decision to exclude testimony at trial, when there is testimony of negligence in the record. Thus, assuming arguendo, there was indeed a *Daubert* hearing, this case was not subject to dismissal – only to the possible exclusion of Dr. Schwartz's testimony. (Appellees have filed *no* Motion for Summary Judgment or to Dismiss alleging that Dr. Kanter's testimony is insufficient to get to a jury).

Here, however, the Court of Appeals has done just that. The Court of Appeals has affirmed the trial court's dismissal of Petitioners' Complaint, based on its finding that the trial court made a discretionary *Daubert* ruling (though the record is clear that no such hearing was requested by Respondents, briefed by Respondents, argued by Respondents or analyzed by the trial court) to exclude Dr. Schwartz's testimony at trial. This case is not subject to dismissal even if Dr. Schwartz's testimony is excluded at trial. Dr. Kanter has testified on behalf of Petitioners and has established medical negligence and causation on behalf of the Respondent doctors. His testimony is

currently unrebutted and there has never been a Motion to Dismiss or Motion for Summary Judgment to dismiss the case based on any deficiency in Dr. Kanter's testimony.

If full Court review is not deemed necessary here, this Court at least has the authority to grant, vacate, and remand this case back to the trial court, to at least conduct the 24-9-67.1(d) *Daubert* hearing that never took place in this case, but is somehow the Georgia Court of Appeals basis for affirmance. See, for example, *Thomas v. American Home Products*, 519 U.S. 913 (1996).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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655 S.E.2d 656

Court of Appeals of Georgia.
SPACHT et al.
v.
TROYER et al.
No. A07A1531.

Nov. 30, 2007.
Reconsideration Denied Dec. 14, 2007.
Certiorari Denied May 19, 2008.

Greer, Klosik, Daugherty, Swank & McCune, Robert J. McCune, Alina A. Krivitsky, John F. Daugherty, Atlanta, for appellants.

Owen, Gleaton, Egan, Jones & Sweeney, H. Andrew Owen, Jr., Greenberg Traurig, Darcy F. Coty, Lori G. Cohen, Michael J. King, Weinberg, Wheeler, Hudgins, Gunn & Dial, Robert G. Tanner, Thomas E. Lavender III, Atlanta, for appellees.

MIKELL, Judge.

Timothy and Andrea Spacht, individually and on behalf of N.S., a minor, sued Children's Healthcare of Atlanta, Dr. Wendy A. Troyer, Dr. William G. Keyes, Dr. James Thomsen, Dr. Verlia Gower, Dr. Theodore Brand, and Dr. John Bleacher for medical malpractice. The Spachts supported their complaint with an affidavit from Dr. David L. Schwartz, a pediatric surgeon, who opined that the defendant doctors had deviated from the acceptable standard of care. Drs. Troyer and Keyes, both neonatologists, filed a motion to dismiss, claiming that the affidavit was insufficient under OCGA § 9-11-9.1 because Dr. Schwartz was not

qualified under OCGA § 24-9-67.1(c). Drs. Thomsen and Gower, both pediatric otolaryngologists, filed a similar motion to dismiss.

The trial court concluded that it had insufficient information to determine whether Dr. Schwartz was competent to testify against the defendant doctors and ordered an OCGA § 24-9-67.1(d) pretrial hearing. After conducting the hearing and considering "all of the evidentiary materials of record," including a supplemental affidavit from Dr. Schwartz and affidavits and depositions from the defendant doctors, the court granted the motions to dismiss. The Spachts then obtained a certificate of immediate review. We granted appellants' application for interlocutory appeal. For the reasons outlined below, we affirm the trial court's ruling.

1. Initially, the parties dispute the appropriate standard of review. OCGA § 9-11-9.1(e) requires an affiant to meet the requirements of OCGA § 24-9-67.1. The penalty for failure to supply a proper affidavit per OCGA § 9-11-9.1 is dismissal. Usually dismissals are subject to de novo review.[1] But the interplay of the two Code sections means that, when the trial court has had the hearing contemplated by OCGA § 24-9-67.1(d) as in this case, our review

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[1] *Atlanta Women's Health Group v. Clemons*, 287 Ga.App. 426, 651 S.E.2d 762 (2007).

determines only whether the trial court has abused its discretion.[2]

2. The Spachts claim that the trial court erred by dismissing their complaint on issues not raised or addressed by the parties – whether Dr. Schwartz qualified as a "practicing expert" or "teaching expert" as defined in OCGA § 24-9-67.1(c)(2). They point out that, in their motions to dismiss, the defendant doctors argued that Dr. Schwartz was not qualified to render an opinion because he lacked experience in neonatology or pediatric otolaryngology.

An expert testifying about the standard of care in a medical malpractice case need not actively practice in the same specialty or practice area as the defendant doctor.[3] Thus, the fact that Dr. Schwartz is a pediatric surgeon and not a neonatologist or pediatric otolaryngologist would not have authorized the court to dismiss the Spachts' complaint. Nonetheless, Dr. Schwartz must meet the requirements of OCGA § 24-9-67.1 to be deemed qualified to testify under OCGA § 9-11-9.1,[4] and the trial court adequately notified the

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[2] *MCG Health v. Barton*, 285 Ga.App. 577, 580(1), 647 S.E.2d 81 (2007); *Mays v. Ellis*, 283 Ga.App. 195, 199(1)(b), 641 S.E.2d 201 (2007).

[3] *Mays, supra* at 196-197(1)(a), 641 S.E.2d 201; *Canas v. Al-Jabi*, 282 Ga.App. 764, 795(3)(c), 639 S.E.2d 494 (2006), rev'd on other grounds, *Kaminer v. Canas*, 282 Ga. 830, 653 S.E.2d 691 (2007); *Cotten v. Phillips*, 280 Ga.App. 280, 282-285, 633 S.E.2d 655 (2006).

[4] OCGA § 24-9-67.1(e).

parties that it would be considering those issues at the OCGA § 24-9-67.1(d) hearing.

3. We turn now to the pivotal question on appeal, whether the trial court erred in its conclusion that Dr. Schwartz was not competent to testify as an expert under OCGA § 24-9-67.1 based on its review of Dr. Schwartz's affidavits. We find that it did not abuse its discretion in so concluding.

In pertinent part, Dr. Schwartz averred in his supplemental affidavit that

> [a]s a board certified pediatric surgeon, I have the training, knowledge and experience to diagnose and surgically manage children with vascular rings, which is the medical condition at issue in this case. My knowledge and experience in diagnosing and surgically managing children with vascular rings was gained from my extensive medical training and experience. . . . Every day I cooperate with all of the specialists involved in a child's medical care to determine whether surgery is the best option for a child. I regularly cooperate with neonatologists and pediatric otolaryngologists to manage surgical problems in children. A child with a vascular ring must be diagnosed immediately by neonatologists and/or pediatric otolaryngologists and then they must refer the child to a pediatric surgeon so that the pediatric surgeon may immediately evaluate the child for surgical division of the vascular ring. Based upon over thirty years of experience in diagnosing

> and surgically managing children with vascular rings and upon a review of the certified medical records from Children's Healthcare of Atlanta which reflects the treatment that Dr. Troyer, Dr. Keyes, Dr. Gower, and Dr. Thomsen gave to [N.S.], it is my opinion that Dr. Troyer, Dr. Keyes, Dr. Gower[,] and Dr. Thomsen failed to exercise that degree of skill and care ordinarily required by the medical profession in general under like conditions and similar circumstances.

Dr. Schwartz then lists specific acts or omissions committed by the defendant doctors.

Pursuant to OCGA § 24-9-67.1(c)(2), the opinion of an expert in a medical malpractice action is admissible only if, at the time of the act or omission alleged to have occurred, the expert

> had actual professional knowledge and experience in the area of practice or specialty in which the opinion is to be given as the result of having been regularly engaged in: (A) The active practice of such area of specialty of his or her profession for at least three of the last five years, with sufficient frequency to establish an appropriate level of knowledge, *as determined by the judge,* in performing the procedure, diagnosing the condition, or rendering the treatment which is alleged to have been performed or rendered negligently by the defendant whose conduct is at issue; or (B) The teaching of his or her profession for at least three of the last five years

> as an employed member of the faculty of an educational institution accredited in the teaching of such profession, with sufficient frequency to establish an appropriate level of knowledge, *as determined by the judge,* in teaching others how to perform the procedure, diagnose the condition, or render the treatment which is alleged to have been performed or rendered negligently by the defendant whose conduct is at issue.[5]

Subsection (f) of the statute provides that

> [i]t is the intent of the legislature that, in all civil cases, the courts of the State of Georgia not be viewed as open to expert evidence that would not be admissible in other states. Therefore, in interpreting and applying this Code section, the courts of this state may draw from the opinions of the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 [113 S.Ct. 2786, 125 L.Ed.2d 469] (1993); *General Electric Co. v. Joiner,* 522 U.S. 136 [118 S.Ct. 512, 139 L.Ed.2d 508] (1997); *Kumho Tire Co. Ltd. v. Carmichael,* 526 U.S. 137 [119 S.Ct. 1167, 143 L.Ed.2d 238] (1999); and other cases in federal courts applying the standards announced by the United States Supreme Court in these cases.[6]

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[5] (Emphasis supplied.)

[6] OCGA § 24-9-67.1(f).

Constant in *Daubert* and cases applying the standards set forth therein is the theme that the trial court is the gatekeeper of expert testimony.[7] OCGA § 24-9-67.1 is consistent with this theme because it gives the trial judge the discretion to determine whether the purported expert is competent to testify. In the case at bar, the trial court considered affidavits, had a hearing, and considered late-filed affidavits on the issue before rendering its decision. This careful, fact-based procedure is precisely what the statute, OCGA § 24-9-67.1, contemplates.[8]

(a) Applying the statute, the trial court concluded that Dr. Schwartz was not competent to testify as a practicing expert because, despite his averment that he regularly cooperated with neonatologists and pediatric otolaryngologists in managing pediatric surgical problems and had over 30 years of experience in diagnosing and surgically managing children with vascular rings, the record was silent as to "*when* within the last

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[7] *See generally Nathans v. Diamond*, 282 Ga. 804, 806, n. 8, 654 S.E.2d 121 (2007) ("OCGA § 24-9-67.1(c)(2)(A) grants trial courts the authority to determine whether an expert is properly qualified"); *McDowell v. Brown*, 392 F.3d 1283, 1298(IV) (11th Cir.2004) ("In *Daubert*[, *supra*], the United States Supreme Court impressed a gatekeeping role upon judges, and directed them to ensure that any and all scientific testimony or evidence is not only relevant, but reliable") (punctuation omitted); *Daubert, supra* at 589, 113 S.Ct. 2786; *Pipitone v. Biomatrix*, 288 F.3d 239, 250(II)(C) (5th Cir.2002); *Dodge v. Cotter Corp.*, 203 F.3d 1190, 1200(IV), n. 12 (10th Cir.2000).

[8] *See Cotten, supra* at 286, 633 S.E.2d 655.

thirty years Dr. Schwartz ha[d] 'diagnosed the condition' which the doctor defendants in this case are alleged to have wrongfully failed to diagnose – specifically, the 'vascular ring.'" Accordingly, the trial court was "unable to determine from the record before it whether Dr. Schwartz had made even *one* diagnosis of a 'vascular ring' within five years of March 12, 2002," the date at issue in this case.

As stated earlier, subsection (c)(2)(A) of the statute requires practice "of such area of specialty . . . for at least three of the last five years, with sufficient frequency to establish *an appropriate level of knowledge, as determined by the judge.*"[9] In a recent decision, the Supreme Court of Georgia made clear that this language does not require an expert to have knowledge and experience in the same area of practice or specialty as the defendant doctors.[10] Instead, the expert must have "knowledge and experience in the practice or specialty that is relevant to the acts or omissions that the plaintiff alleges constitute malpractice."[11]

To determine "the area of practice or specialty in which the opinion is to be given," we look to the allegations of plaintiff's complaint and not to the

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[9] (Emphasis supplied.) OCGA § 24-9-67.1. *See Cotten, supra* at 284, n. 8, 633 S.E.2d 655.

[10] *Nathans, supra* (approving *Barton, supra*; *Mays, supra*; and *Cotten, supra*).

[11] *Id.*

treating physician's apparent expertise.[12] Here, the complaint alleges that the defendant doctors failed to read and act upon CAT scan results, which revealed that N.S., who was two and one-half months old at the time, had a vascular ring. The complaint further alleges that the doctors should have referred N. for surgery to divide the vascular ring, but instead performed an unnecessary tracheotomy, salivary gland excision, and other procedures that could have been avoided if the defendant doctors had recognized and treated the vascular ring. It does not allege that the defendant doctors performed the allegedly unnecessary procedures negligently. Thus, the "area of practice or specialty in which the opinion is to be given" involves the diagnosis of a vascular ring.[13]

In this case, the trial court specifically found that the "three of the last five years" portion of the requirements set forth in the statute was fulfilled by the statement in Dr. Schwartz's affidavit that he had "over thirty years of experience in diagnosing and surgically managing children with vascular rings." The trial court's ruling that Dr. Schwartz was not competent to testify as a practicing expert, however, was based upon its finding that he did not state in his affidavits the frequency with which he diagnosed the

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[12] *Barton, supra* at 581(1), 647 S.E.2d 81; *Mays, supra* at 198(1)(b), 641 S.E.2d 201; *Abramson v. Williams*, 281 Ga.App. 617, 619, 636 S.E.2d 765 (2006).

[13] *See Mays, supra*.

condition. Although the three-year and five-year time lines, established by the legislature, are precise limitations on the trial court's discretion, we cannot say that the trial courts abused its discretion when it found that the "three of the last five years" requirement was satisfied by Dr. Schwartz's affidavit.[14]

Additionally, we cannot hold as a matter of law that a trial court abuses its discretion when, after an OCGA § 24-9-67.1(d) hearing, it decides that a physician who specializes in one area of medicine lacks the "appropriate level of knowledge" to testify against a physician in a different specialty, albeit a closely related one, based upon a factual finding that the affidavit does not expressly state the frequency with which the affiant has diagnosed the condition that is alleged to have been misdiagnosed.[15] Although the affiant here asserts that he frequently "cooperates with" physicians in the sued specialties, is very familiar with vascular rings, and frequently has operated to correct vascular rings over his 30 years of experience, he does not state when during his 30 years of practice he diagnosed the condition. Based on the record here, we cannot conclude that the trial

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[14] *Canas, supra* at 796(3)(c), 639 S.E.2d 494.

[15] OCGA § 24-9-67.1(c)(2)(A) allows an "appropriate level of knowledge" to be demonstrated in performing a procedure, diagnosis, *or* treatment. Here, however, as the trial court recognized in its order, the plaintiffs limited the analysis in this case to diagnosis alone, both by the allegations in the complaint and by the expert's own affidavit testimony.

court's findings that it was unable to determine from the record that Dr. Schwartz had made even one diagnosis of a "vascular ring" within five years of March 12, 2002, and consequently, that Dr. Schwartz was not competent to offer an opinion as a practicing expert, constituted an abuse of its discretion. The statute specifically assigns to the trial court the duty to determine whether the expert actively practiced the area of specialty with sufficient frequency to establish an appropriate level of knowledge to render him competent to testify. The trial court did not abuse its discretion in finding here that Dr. Schwartz was not competent to testify as a "practicing expert."

(b) The trial court also found that Dr. Schwartz was not competent to testify as a "teaching expert." As the trial court's order stated, although the affidavit indicated that he was a member of the faculty at two schools, there was no evidence that he

> is or was an "employed" member of either faculty, that he was actually *teaching* at either institution as an employed faculty member, that he had so taught "for at least three of the last five years" relative to the date the alleged failure to diagnose took place, or most importantly, that [while there he] has taught others to "diagnose the condition . . . which is alleged to have been performed or rendered negligently by the defendant whose conduct is at issue," *and* "with sufficient frequency to establish an appropriate level of knowledge" to the Court.

(Emphasis in original.) OCGA § 24-9-67.1(c)(2)(B) provides that an expert may establish his professional knowledge and expertise based on

> [t]he teaching of his or her profession for at least three of the last five years as an employed member of the faculty of an educational institution accredited in the teaching of such profession, with sufficient frequency to establish an appropriate level of knowledge, *as determined by the judge,* in teaching others how to perform the procedure, diagnose the condition, or render the treatment which is alleged to have been performed or rendered negligently by the defendant whose conduct is at issue.[16]

The trial court correctly interpreted the statute, concluding that in order to be deemed competent through this subsection of the statute, the witness, to be qualified, must have been an *employed* member of the faculty of an educational institution and must have taught others, for at least three of the last five years, to diagnose the condition that is alleged to have been performed or rendered negligently by the defendant doctors. In this case, neither the affidavit nor the supplemental affidavit so states. Instead, the supplemental affidavit states that Dr. Schwartz was an "assistant clinical professor" in surgery at one institution since 1974 and a "clinical assistant professor" at another since 1978. There is no mention

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[16] (Emphasis supplied.) OCGA § 24-9-67.1(c)(2)(B).

whatsoever as to whether Dr. Schwartz was *employed* by an educational institution in 2002 and in the five years prior to that and no mention of his having taught the subject necessary to be deemed an expert within five years of March 12, 2002. Therefore, we cannot find that the trial court abused its discretion when it concluded that Dr. Schwartz could not qualify as a "teaching expert" in this case. Accordingly, we affirm the trial court's grant of the defendant doctors' motions to dismiss.

Judgment affirmed.

ANDREWS, P.J., BLACKBURN, P.J., SMITH, P.J., and RUFFIN, J., concur.

JOHNSON, P.J., and PHIPPS, J., concur in part and dissent in part. PHIPPS, Judge, concurring in part and dissenting in part.

I concur in Divisions 1 and 2. Because Dr. Schwartz was qualified under OCGA § 24-9-67.1(c)(2)(A) to render an expert opinion about the diagnosis and treatment of a vascular ring, the trial court abused its discretion by granting the defendant doctors' motions to dismiss. I therefore dissent to Division 3(a). I concur specially in Division 3(b).

We have repeatedly stated and the Supreme Court of Georgia has made clear that the language of OCGA § 24-9-67.1(c)(2)(A) does not require an expert to have knowledge and experience in or to actively

practice in the same area of practice or specialty as the defendant doctors.[17] Yet the majority plainly applies a more stringent standard here because Dr. Schwartz is not a neonatologist or pediatric otolaryngologist. The appropriate inquiry is whether the expert has "knowledge and experience in the practice or specialty that is relevant to the acts or omissions that the plaintiff alleges constitute malpractice."[18]

Based on the complaint's allegations, the "area of practice or specialty in which the opinion is to be given" involves the diagnosis and treatment of a vascular ring.[19] Dr. Schwartz testified that he is a board certified pediatric surgeon and has the "training, knowledge, and experience to diagnose and surgically manage children with vascular rings." He further testified that he daily cooperates with all specialists involved in a child's care to determine whether surgery is the best option and regularly cooperates with neonatologists and pediatric otolaryngologists to manage surgical problems in children. Dr. Schwartz averred that he has "over thirty

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[17] *Nathans v. Diamond*, 282 Ga. 804, 654 S.E.2d 121 (2007); *Mays v. Ellis*, 283 Ga.App. 195, 196-197(1)(a), 641 S.E.2d 201 (2007); *Canas v. Al-Jabi*, 282 Ga.App. 764, 795(3)(c), 639 S.E.2d 494 (2006), rev'd on other grounds, *Kaminer v. Canas*, 282 Ga. 830, 653 S.E.2d 691 (2007); *Cotten v. Phillips*, 280 Ga.App. 280, 284-285, 633 S.E.2d 655 (2006).

[18] *Nathans, supra*.

[19] *See Mays, supra* at 198(1)(b), 641 S.E.2d 201.

years experience in diagnosing and managing children with vascular rings."

We have allowed doctors with less experience to render expert opinions in medical malpractice cases. For example, earlier this term, we decided *MCG Health v. Barton,*[20] in which an emergency room physician testified that a urologist breached the standard of care by failing to timely evaluate and treat an injury, resulting in the loss of a testicle.[21] The plaintiff's expert testified that he was "a licensed physician with over 20 years of emergency room experience, including experience diagnosing testicular injuries," and that was deemed sufficient to qualify him to testify regarding the failure to timely evaluate the plaintiff's injuries.[22] Despite the fact that Dr. Schwartz has been practicing pediatric surgery since 1974 and has over 30 years experience in diagnosing vascular rings, the majority does not find his experience sufficient to allow him to testify regarding the failure to diagnose N.S.'s vascular ring.

The trial court determined that Dr. Schwartz did not qualify as a "practicing expert" witness under OCGA § 24-9-67.1(c)(2)(A) because his affidavits failed to show that he had diagnosed a vascular ring on a specific date within five years of the alleged failure to diagnose. Dr. Schwartz testified, however,

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[20] 285 Ga.App. 577, 647 S.E.2d 81 (2007).

[21] *Id.* at 580, 647 S.E.2d 81.

[22] *Id.* at 581(1), 647 S.E.2d 81.

that he is involved every day in determining whether a child needs surgery. A vascular ring is an uncommon genetic disorder that requires surgery, and Dr. Schwartz testified that he has the knowledge and experience to diagnose this condition. He specifically testified that he has been diagnosing and managing vascular rings for at least the last 30 years, which is sufficient to satisfy the statute. The majority interprets the statute far too narrowly by concluding otherwise.

Because the record shows that "the area of practice or specialty in which the opinion is to be given" is an area of practice in which Dr. Schwartz "possessed the requisite knowledge and experience under OCGA § 24-9-67.1(c)(2),"[23] he is authorized to render an expert opinion in the case about the diagnosis and treatment of a vascular ring.[24]

I am authorized to state that Presiding Judge JOHNSON joins in this opinion.

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[23] *Barton, supra* at 581-582, 647 S.E.2d 81; *see also Mays, supra* at 199, 641 S.E.2d 201.

[24] *See Abramson v. Williams,* 281 Ga.App. 617, 619, 636 S.E.2d 765 (2006).

IN THE SUPERIOR COURT OF DEKALB COUNTY

STATE OF GEORGIA

TIMOTHY AND ANDREA SPACHT, individually and as next friend of N.S., a minor child,	:	Civil Action File No. 06CV-4104-4
Plaintiffs,	:	
vs.	:	
CHILDREN'S HEALTHCARE OF ATLANTA, INC., DR. WENDY A. TROYER, DR. WILLIAM G. KEYES, DR. JAMES THOMSEN, DR. VERLIA GOWER, DR. THEODORE BRAND, and DR. JOHN BLEACHER,	:	
Defendants.	:	

ORDER ON DEFENDANTS' MOTIONS TO DISMISS AND PLAINTIFFS' MOTION FOR PROTECTIVE ORDER

(Filed July 28, 2006)

Defendants WENDY A. TROYER's and WILLIAM G. KEYES' motion to dismiss (filed April 18, 2006), Defendant CHILDREN'S HEALTHCARE OF ATLANTA's O.C.G.A. § 9-11-9.1 motion to dismiss (filed April 19, 2006), Defendant CHILDREN'S HEALTHCARE OF ATLANTA's O.C.G.A. § 9-11-9.2 motion to dismiss (filed April 19, 2006 and supplemented May 4 and June 29, 2006), Defendants JAMES THOMSON's

and VERLIA GOWER's motion to dismiss (filed May 15, 2006), and Plaintiffs' motion for protective order (filed May 26, 2006) came regularly before the Court for consideration. Upon review of the pleadings and other matters of record,[1] the Court finds as follows:

This is an action for medical malpractice. Plaintiffs contend herein that Defendants failed to diagnose and treat a "vascular ring" in their minor child, N.S., such that for the first two and one-half years of his life the child underwent numerous unnecessary and painful surgeries and medical and therapeutic treatments to remediate problems attributable to and remediable by treatment of the "root cause" of the problem, e.g., the undiagnosed vascular ring. As a result of this misdiagnosis and treatment, Plaintiffs contend, they have incurred unnecessary medical expenses and emotional pain and suffering, and their child has and will continue to experience physical and emotional pain and suffering throughout his life.

Defendant[2] now move for the dismissal of Plaintiffs' complaint against them, contending that

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[1] Oral argument was requested on only one motion to dismiss, that of Defendants KEYES and TROYER. As the substance of all defendants' motions to dismiss is the same, the Court declines to hear oral argument on one only and addresses all pending motions to dismiss in this Order. Uniform Superior Court Rule 6.3 (West 2005).

[2] Defendants THEODORE BRAND and JOHN BLEACHER filed separate answers on May 11, 2006, but have not moved to dismiss Plaintiffs' complaint. For the purposes of this order, the Court refers to the moving defendants collectively as "Defendants."

Plaintiffs' O.C.G.A. § 9-11-9.1 expert affidavit is legally insufficient, and further that Plaintiffs failed to comply with the initial pleading requirements of the newly-enacted O.C.G.A. § 9-11-9.2, requiring a release of medical records to be filed contemporaneously with the complaint for medical malpractice. The Court addresses these claims below in reverse order.

O.C.G.A. § 9-11-9.2 Medical Records Release Authorization Requirement[3]

There exists no dispute in this case that Plaintiffs did not file the medical records release authorization required by O.C.G.A. § 9-11-9.2 "contemporaneously with the filing of their complaint," or that the "conditional" release which they subsequently filed on May 2, 2006 does not comply with that statute's requirements. O.C.G.A. § 9-11-9.2(b)

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[3] In any action for damages alleging medical malpractice against a professional licensed by the State of Georgia and listed in subsection (d) of Code Section 9-11-9.1 against a professional corporation or other legal entity that provides health care services through a professional licensed by the State of Georgia and listed in subsection (d) of Coda Section 9-11-9.1, or against any licensed health care facility alleged to be liable based upon the action or inaction of a health care professional licensed by the State of **Georgia** and listed in subsection (d) of Coda Section 9-11-9.1 *contemporaneously with the filing of the complaint, the plaintiff shall be required to file a medical authorization form. Failure to provide this authorization shall subject the complaint to dismissal.*

O.C.G.A. § 9-11-9.2(a) (Supp. 2005) (emphasis added).

(Supp. 2005).[4] Such failure subjects Plaintiff's complaint to dismissal upon motion by defendants. *Id.* On July 13, 2006, however, the Georgia Court of Appeals affirmed the decision of DeKalb State Court Judge Edward Carriere that the medical records release authorization requirement of O.C.G.A. § 9-11-9.2 conflicts with, and is preempted by, federal law.

> Linda Queen brought a medical malpractice action against Northlake Medical Center, LLC and others. Northlake moved to dismiss the complaint for Queen's failure to comply with the medical record release requirement of OCGA § 9-11-9.2. The trial court denied the motion, concluding that Section 9-11-9.2 was preempted by the Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191 ("HIPPA"), and thus Queen was not required to file a medical records release authorization in compliance with the Georgia statute. We granted Northlake's application for interlocutory appeal, as the issue of whether HIPPA preempts OCGA 9-11-9.2 is one of first impression.
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> . . .
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> The authorization which Queen filed with her complaint . . . *does not* state that Queen is agreeing to the statutory requirements. In fact, the authorization adopts the opposite

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[4] Plaintiffs on June 8, 2008 also filed in the record a complete and certified copy of the medical records of N.S. from Children's Healthcare of Atlanta at Scottish Rite Hospital.

position, that the recipient health care provider may provide medical records *only* to Queen's attorneys, not to Northlake's attorneys. The authorization states, that Queen "maintains that [HIPPA] preempts State law, including the provisions of OCGA § 9-11-9.2 . . . "[5] . . . Thus, the authorization does not satisfy OCGA § 9-11-9.2, and Queen's complaint would be subject to dismissal unless the Georgia statute is preempted.

. . .

Northlake argues that HIPPA does not preempt Section 9-11-9.2 because the state law does not contravene HIPPA and it is possible to comply with both HIPPA and OCGA 9-11-9.2. Queen, on the other hand, contends that the statute is preempted because it does not *require* that the elements necessary for a valid authorization under HIPPA be present in an authorization under OCGA § 9-11-9.2.

. . . [W]e conclude that the authorization set forth in OCGA § 9-11-9.2 is contrary to HIPPA because it does not satisfy the requirements of a valid HIPPA authorization. . . . Northlake urges us to read OCGA

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[5] Plaintiffs in their May 2, 2008 "Conditional Medical Authorization Form," similarly attempt by non-statutory language inserted therein to preserve Plaintiffs' privacy rights under HIPPA and any other relevant state or federal law, and makes such release "conditional" upon a ruling by the Court (or an appellate court) that Section 9-11-9.2 applies to this matter. (Plaintiffs' First Amended Complaint, filed May 2, 2006.)

> § 9-11-9.2 to require a HIPPA-compliant authorization because, as a newer statute, it should be read in conjunction with existing law. This would, however, require us to not merely interpret the Code section in light of HIPPA, but to affirmatively add several provisions found nowhere in the statute. It is not the Court's function to rewrite statutes. Because we conclude that OCGA § 9-11-9.2 is contrary to HIPPA and none of the exceptions contained in 45 C.F.R. § 160.203 applies, it is preempted by HIPPA.

Northlake Medical Center LLC v. Queen, No. A06A0540, slip op. at 3 (Ga.Ct.App. July 13, 2006) (underline emphasis added) (footnotes omitted).

Accordingly, Defendant CHILDRBN'S O.C.G.A. § 9-11-9.2 motion to dismiss shall be denied, and those portions of the defendant doctors' motions to dismiss which are premised upon Plaintiffs' failure to comply with O.C.G.A. § 9-11-9.2 shall likewise be denied. Plaintiffs' motion for a protective order, interposed in response to Defendants' Section 9-11-9.2 motions to dismiss, is rendered moot by this holding and will be denied as such.

O.C.G.A. § 9-11-9.1 – Expert Affidavit Requirement[6]

Although Defendants assert substantially the same arguments in moving to dismiss Plaintiffs' complaint pursuant to O.C.G.A. § 9-11-9.2, the contentions raised in their Section 9-11-9.1 motions to dismiss diverge along identity lines. The defendant hospital (CHILDREN'S) contends that Plaintiffs' expert affidavit is insufficient as it fails to specifically allege a negligent act or omission by such hospital, while the defendant doctors (TROYER, KEYES, THOMSEN, and GOWER) contend that the affidavit is deficient as Plaintiffs' expert is not competent to testify in the various specialties and subspecialties

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[6] In any action for damages alleging professional malpractice against a professional licensed by the State of Georgia and listed in subsection (d) of this Code section or against any licensed health care facility alleged to be liable based upon the action or inaction of a health care professional licensed by the State of Georgia and listed in subsection (d) of this Code section, the plaintiff shall be required to file with the complaint an affidavit of an expert competent to testify, which affidavit shall set forth specifically at least one negligent act or omission claimed to exist and the factual basis for each such claim.

If a plaintiff files an affidavit which is allegedly defective, and the defendant to whom it pertains alleges, with specificity, by motion to dismiss filed on or before the close of discovery, that said affidavit is defective, the plaintiff's complaint is subject to dismissal for failure to state a claim. . . .

O.C.G.A. § 9-11-9.1(a), (b) (1993).

practiced by such defendant doctors. The Court addresses their contentions separately below.

Defendant Hospital

Defendant CHILDREN'S contends that Plaintiffs' complaint against them must be dismissed pursuant to O.C.G.A. § 9-11-9.1 as "[n]owhere in his affidavit does Dr. Schwartz ever allege that any nurse, technician, or other agent or employee of Defendant CHILDREN'S deviated from the applicable standard of care in any respect in the treatment of [N.S.]" (Defendant CHILDREN'S brief, p. 2.) The affidavit signed by Plaintiffs' expert, Defendant CHILDREN'S contends,

> is factually identical to . . . the affidavits presented in *Cander Hospital v. Carter, 224 Ga.App. 425 (1997)* and *Goins v. Tucker, 227 Ga. App. 524 (1997)*.[7] In both of these medical malpractice cases involving a hospital defendant and physician co-defendants, the plaintiffs' experts signed affidavits specifying acts of negligence against co-defendant physicians, without specifying any acts of negligence against the hospital or their agents or employees. Both cases were dismissed

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[7] In order that the Court may quickly locate and review the parties' authority, counsel are requested to comply with standard citation form for Georgia cases, which requires a citation to the Georgia or Georgia Appeals Reporter (as appropriate) *and* the Southeastern Reporter as well.

> against the hospitals on the basis that plaintiffs' experts' affidavits were insufficient . . . pursuant to O.C.G.A. § 9-11-9.1.

(Defendant CHILDREN'S brief, pp. 2-3.)

In response, Plaintiffs argue that "the liability of . . . CHILDREN'S . . . is based upon [the doctrine of] *respondeat superior*," pointing to Paragraph 10 of their Complaint wherein they allege that Defendant CHILDREN'S "held out" the doctor defendants "as being employees, giving its patients a reasonable belief that said Defendants were acting as agents or employees [of Defendant CHILDREN'S] at all times herein. . . . " (Plaintiff's response, p. 2.) Because the expert affidavit sufficiently identifies negligent acts or omissions by the defendant doctors, their alleged negligence is attributable to Defendant CHILDREN'S under the doctrine of *respondeat superior,* and the affidavit is legally sufficient, Plaintiffs contend, citing *Tenet Healthcare Corp. v. Gilbert*, 277 Ga.App. 895, 627 S.E.2d 821 (2006). (Plaintiffs response, p. 2.)

The Court concurs with Plaintiffs.

In *Dozier v. Clayton Co. Hosp. Authority,* 206 Ga.App.62, 424 S.E.2d 632 (1992), the Court of Appeals considered whether an affidavit which failed to assert any act of negligence directly against the defendant hospital authority failed to meet the initial pleading requirements of Section 9-11-9.1. As the affidavit at issue alleged negligent acts or omissions by the hospital authority's co-defendant "professionals," and as the complaint further alleged that the

hospital authority was liable for the acts or omissions of such employee or agent "professionals" under the doctrine of *respondeat superior*, the Court of Appeals found that the trial court erred in dismissing the plaintiffs' complaint against the hospital authority pursuant to Sections 9-11-9.1 and 9-11-12(b)(6)[6]:

> On February 14, 1991, appellants filed a medical malpractice action alleging the February 19, 1989 wrongful death of Gregory A. Dozier. Attached to the complaint was a document entitled "Affidavit of George Podgorny, MD." *At least one negligent act or omission on the part of each defendant was set forth in the document. . . .*
>
> *We . . . consider whether appellants were required to attach a supporting expert affidavit to their complaint against the hospital authority, based inter alia on medical malpractice claims stemming from alleged acts of negligence by the authority's agents and employees.*
>
> O.C.G.A. § 9-11-9.1 pertinently provides that "[i]n any action for damages alleging *professional* malpractice, the plaintiff shall

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[6] "Under the Civil Practice Act a motion to dismiss a complaint for failure to state a claim should not be granted unless the averments in the complaint disclose with certainty that the plaintiff would not be entitled to relief under any state of facts that could be proved in support of the claim," *Union Camp Corp. v. Southern Bulk Industries, Inc.*, 193 Ga.App. 90, 386 S.E.2d 866 (1999) (citation omitted); *see also* O.C.G.A. § 9-11-12(b)(6) (1993).

be required to file with the complaint an affidavit of an expert." (Emphasis supplied.) In *Lamb v. Candler Gen. Hosp.*, 262 Ga. 70, 71(1), 635 413 S.E.2d 720, it was held that where professional skill and judgment are not involved, an affidavit under OCGA § 9-11-9.1 is not necessary. However, *in the case at bar it appears that all of the claims averred against the authority . . . were grounded upon the authority's liability for the acts and omissions of its agents and employees under the doctrine of* ***respondeat superior.***[9] These acts of omissions, as averred in the complaint, required the exercise of some form of medical skill and judgment on the part of the agents or employees concerned. . . .

. . .

[A]n appropriate affidavit is required not only when a particular claim is against a "professional" but also when a particular claim is grounded upon "professional malpractice," that is, an act or omission caused by a professional" which constitutes

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[9] On July 14, 2008, Plaintiffs filed their "Second Amended Complaint," wherein they assert that Defendant CHILDREN'S "fail[ed] to properly disseminate medical records . . . and/or [the] patient's medical chart . . . to the proper physicians," and that Defendant CHILDREN'S is responsible for any acts o[f] negligence of their employees in failing to properly disseminate the medical records of [N.S.] . . . and/or his medical chart . . . to the proper physicians . . . under [the doctrine of] *respondeat superior*." (Second Amended Complaint, ¶¶ 33-35.)

malpractice. The hospital authority not being a "professional," the affidavit requirement does not apply automatically as to any claim asserted against it. *Greene County Hasp. Auth. v. Turner,* 205 Ga.App. 213, 421 S.E.2d 715 and *Thornton v. Ware County Hosp. Auth.,* 205 Ga.App. 202, 421 S.E.2d 713. Rather, *the affidavit requirement applies against a hospital not only when liability is based upon the doctrine of* ***respondeat superior*** *but when it is further grounded upon the averment of acts of omissions requiring the exercise of professional skill and judgment by agents of employees who themselves are recognized as "professionals".* . . . Thus, to the extent that the complaint avers claims of liability, based on the doctrine of *respondeat superior,* arising from acts or omissions constituting malpractice by doctors, registered professional nurses, or other "professionals," as recognized by said statutes, an appropriate affidavit . . . was required under OCGA § 9-11-9.1. . . .

. . .

'[A] motion to dismiss "should not be granted unless the averments in the complaint disclose with certainty that the plaintiff would not be entitled to relief under any state of facts that could be proved in support of the claim," ' . . . As such certainty does not exist in this instance, *the trial court erred in dismissing appellants' complaint* ***in toto*** *as against the hospital authority.*

206 Ga.App. at 64-66 (emphasis added) (citations omitted); *see also, HCA Health Svcs. of Georgia, Inc. v. Hampshire,* 206 Ga.App. 108, 424 S.E.2d 293 (1992) (emphasis added) ("Appellees alleged and Northlake admitted in its answer that O.M. Arora, M.D., . . . was a member of Northlake's medical staff at the time of the surgery at issue. Appellees specifically alleged in their complaint that Dr. Arora (as one of the individual physician-defendants) was 'acting as [Northlake's] agent, . . . thereby setting forth a claim against Northlake under the theory of *respondeat superior.* A review of appellee's OCGA § 9-11-9.1 affidavit reflects that [plaintiff's expert] set forth specific acts of negligence allegedly committed by Dr. Arora. *Since Northlake's liability rests upon the theory of* ***respondeat superior****, 'appellees complied with the requirements of OCGA 9-11-9.1 by filing with the complaint affidavits which set forth the negligence of the professionals whose acts form the basis for [their] claim against the hospital.*"); *Thornton v. Ware County Hospital Authority*, 205 Ga.App. 202, 421 S.E.2d 713 (1992) (emphasis added) ("The hospital moved to dismiss the complaint on the grounds that neither of the affidavits filed by appellants set forth any negligent act of the hospital. Appellants subsequently amended their complaint to allege that the hospital was liable . . . under a theory of *respondeat superior. . . . We conclude that appellants complied with the requirements of OCGA § 9-11-9.1 by filing with the complaint affidavits which set forth the negligence of professionals whose acts form the basis for appellee's claim against the hospital.*"); *Tenet*, 277

Ga.App. at 902 (emphasis added) ("Tenet Healthcare and Tenet Healthsystem, some of whose employees allegedly committed the negligence, both moved to dismiss under O.C.G.A. § 9-11-9.1 on the ground that the [plaintiff's expert's] affidavit failed to specify an act of negligence against them as corporate entities. *This argument fails on its face, however, [as] the specification of negligent acts against their employees would suffice, as Gilbert was asserting liability under* ***respondeat superior***.").[10]

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[10] While Defendant CHILDREN'S correctly cites *Candler Hospital* and *Goins* for a contrary result, both such cases are distinguished on their facts. In *Candler Hospital*, "[t]he [O.C.G.A. § 9-11-9.1] affidavits *d[id]not specify any negligent act or omission by the agents or employees of Candler Hospital.* Nor d[id] they specify any facts upon which the malpractice claim against Candler Hospital is based. *In fact, the affidavits d[id] not even state that Candler Hospital's agents or employees were involved in the surgery*" which formed the basis for the plaintiff's action for medical malpractice. 224 Ga.App. at 426 (emphasis added).

Likewise, in *Goins*, the plaintiff's expert's affidavit made no reference to the defendant hospital, Georgia Baptist, or any acts or omissions by its employees or staff. "[R]eference to Georgia Baptist appears on the document only because the caption of the case precedes the affidavit. *The body of the affidavit contains no reference to Georgia Baptist or its staff.* . . . When examining the affidavit as a whole, the eleventh paragraph is clearly only a summary of the negligent acts *attributed to the defendant physicians* in the preceding six paragraphs. . . . The affidavit does not meet the requirements of the statute with regard to defendant Georgia Baptist. . . . " 227 Ga. At 526 (emphasis added).

Defendant CHILDREN'S O.C.G.A. § 9-11-9.1 motion to dismiss shall accordingly be denied.

Defendant Doctors

The question raised by the defendant doctors' O.C.G.A. § 9-11-9.1 motions to dismiss is whether Plaintiffs' affiant, Dr. David L. Schwartz, is "an expert competent to testify" in their respective medical specialties and subspecialties.[11]

> [F]or an affiant to constitute "an expert competent to testify" under O.C.G.A. § 9-11-9.1(a), the affiant's expertise must include knowledge of the standard of care applicable to the defendant-physician as to at least one of the matters on which the plaintiff's malpractice claim is based. This holding is mandated by the language of the statute that the expert affidavit submitted by the plaintiff must specifically set forth "at least one negligent act or omission" allegedly committed by the defendant-physician. . . .

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[11] Plaintiffs' expert, Dr. David L. Schwartz, is a board certified pediatric surgeon presently serving as an assistant clinical professor at Albert Einstein College of Medicine and at New York University Medical Center in New York. (Plaintiff's response to Defendants TROYER's and KEYES' motion, Exhibit "A" thereto.) Defendants TROYER and KEYES are neonatologists; Defendants THOMSEN and GOWER are board certified pediatric otolaryngologists. (Defendants THOMSEN's and GOWER's briet, p. 3; Defendants' TROYER's and KEYES' brief, p. 4.)

[T]he mere fact an affiant is an expert in his or her school of knowledge does not necessarily mean the expert is "competent to testify" under O.C.G.A. § 9-11-9.1(a). See *Piedmont Hosp. v. Milton*, 189 Ga. App. 563 (377 S.E.2d 198) (1988) (rejecting a medical doctor's affidavit against nursing personnel in part because it did not show that the medical doctor was an expert competent to testify "in the field of nursing"); *Milligan v. Manno*, 197 Ga. App. 171 (397 S.E.2d 713) (1990) (setting forth the general rule that a member of a school of practice other than that to which the defendant belongs is not competent to testify as an expert in a malpractice case). . . .

In *Milligan*, supra, this court discussed in the context of the O.C.G.A. § 9-11-9.1 affidavit the general rule excluding practitioners of one school of medicine from testifying against members of other schools and the exception to that rule, as set forth in *Sandford v. Howard*, 161 Ga. App. 495, 497(5) (288 S.E.2d 739) (1982), that "'[w]here there is proof by competent evidence that the methods of treatment are the same despite the difference in the nomenclature of the schools involved, the witness is competent to testify.' [Cit.]" The *Milligan* court then applied that exception to the affidavit required by O.C.G.A. § 9-11-9.1 and held that where the affidavit "establishes that the witness is a member of a different school of medicine

> than that practiced by the defendant but contains no evidence that the methods of treatment of plaintiff's condition are the same so as to bring the witness within the exception to the general rule that he is incompetent to testify[, then] the affidavit is legally insufficient." *Id.* at 172.

Chandler v. Koenig, 203 Ga.App. 684, 685-686, 417 S.E.2d 715 (1992).

On February 15, 2005, Code Section O.C.G.A. § 24-9-67.1 went into effect, codifying and statutorily clarifying the "expert competent to testify" requirement of O.C.G.A. § 9-11-9.1:

> in professional malpractice actions, the opinions of an expert, who is otherwise qualified as to the acceptable standard of conduct of the professional whose conduct is at issue, shall be admissible only if, at the time the act or omission is alleged to have occurred, such expert:
>
> > (1) Was licensed by an appropriate regulatory agency to practice his or her profession in the state in which such expert was practicing or teaching in the profession at such time; and
> >
> > (2) In the case of a medical malpractice action, had actual professional knowledge and experience in the area of practice or specialty in which the opinion is to be given as the result of having been regularly engaged in:

(A) The active practice of such area of specialty of his or her profession for at least three of the last five years, with sufficient frequency to establish an appropriate level of knowledge, as determined by the judge, in performing the procedure, diagnosing the condition, or rendering the treatment which is alleged to have been performed or rendered negligently by the defendant whose conduct is at issue; or

(B) The teaching of his or her profession for at least three of the last five years as an employed member of the faculty of an educational institution accredited in the teaching of such profession, with sufficient frequency to establish an appropriate level of knowledge, as determined by the judge, in teaching others how to perform the procedure, diagnose the condition, or render the treatment which is alleged to have been performed or rendered negligently by the defendant whose conduct is at issue; and

(C) Except as provided in subparagraph (D) of this paragraph: (i) Is a member of the same profession; (ii) Is a medical doctor testifying as to the standard of care of a defendant who is a doctor of osteopathy; or (iii) Is a doctor of osteopathy testifying

> as to the standard of care of a defendant who is a medical doctor; and
>
> (D) Notwithstanding any other provision of this Code section, an expert who is a physician and, as a result of having, during at least three of the last five years immediately preceding the time the act or omission is alleged to have occurred, supervised, taught, or instructed nurses, nurse practitioners, certified registered nurse anesthetist, nurse midwives, physician's assistants, physical therapists, occupational therapists, or medical support staff, has knowledge of the standard of care of that health care provider under the circumstances at issue shall be competent to testify as to the standard of that health care provider. . . .
>
> . . .
>
> An affiant must meet the requirements of this Code section in order to be deemed qualified to testify as an expert by means of the affidavit required under O.C.G.A. § 9-11-9.1.

O.C.G.A. § 24-9-67.1(c), (e) (Supp. 2005).[12]

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[12] The law enacting such statute pertinently provides in Section 15(b) that "[i]t is the intention of the General Assembly that . . . this Act shall apply to causes of action *pending on its*

(Continued on following page)

Review of the record and the parties' briefs regarding the various specialties and subspecialties involved provides the Court with insufficient information to determine whether Plaintiffs' expert Dr. Schwartz is in fact competent to testify against the doctor defendants in this case. As permitted by O.C.G.A. § 24-9-67.1(d), the Court will accordingly

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effective date, unless such application would be unconstitutional." Laws 2005, Act 1, § 15(b) (emphasis added).

Plaintiffs in a June 26, 2006 supplemental brief filed in opposition to Defendants THOMSON's and GOWER's motion to dismiss accordingly contend that such statute should not apply to their cause of action, which purportedly arose on or about March 12, 2002: "O.C.G.A. § 24-9-67.1, if applied to disqualify Plaintiffs' expert, will violate Plaintiffs' fundamental Constitutional rights of due process and access to the courts. Fundamental Constitutional rights require that every party to a lawsuit be afforded the opportunity to be heard and to present his claim or defense. . . . The Constitution of this State and of the United States of America guarantees to all persons due process of law and unfettered access to the courts." (Plaintiff's supplemental brief, p. 2) (citations omitted).

This Court cannot agree. Section 24-9-67.1 was in effect *for more than one year* prior to the February 23, 2006 execution of Plaintiffs' expert's affidavit and the March 24, 2006 filing of Plaintiffs' complaint. Plaintiffs accordingly knew (or should have known) that their expert affiant's qualifications would be judged under such statute. Further, Plaintiffs have failed to acknowledge, much less satisfy, the legal standards applicable to a constitutional challenge to a statute. *See Schneider v. Susquehanna Radio Corp.*, 260 Ga.App. 296, 581 S.E.2d 603 (2003). Finally, Plaintiffs' argument, if correct, would render all statutes which control or limit access to the courts (including O.C.G.A. § 9-11-9.1 unconstitutional, an illogical and incorrect result.

conduct a "pretrial hearing to determine whether [Dr. Schwartz] qualifies as an expert" competent to testify in this matter. Notice of such hearing date will be mailed separately to counsel, and the Court will reserve ruling on all unaddressed portions of the doctor defendants' motions to dismiss[13] (and of Plaintiffs' responses thereto) until after such hearing. (Supp. 2005).

BASED UPON THE FOREGOING,

Defendants WENDY A. TROYER's and WILLIAM C. KEYES' motion to dismiss (filed April 18, 2006) accordingly shall be, **and hereby is, DENIED in part and RESERVED in part;** Defendant CHILDREN'S HEALTHCARE OF ATLANTA'S O.C.G.A. § 9-11-9.1 motion to dismiss (filed April 19, 2006), shall be, **and hereby is, DENIED;** Defendant CHILDREN'S HEALTHCARE OF ATLANTA'S O.C.G.A. § 9-11-9.2 motion to dismiss (filed April 19, 2006 and supplemented May 4 and June 29, 2006) shall be, **and hereby is, DENIED;** Defendants JAMES THOMSON's and VERLIA GOWER's motion to dismiss (filed May 15, 2006) shall be, **and hereby is, DENIED in part and RESERVED in part;** and

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[13] As discussed above, that portion of the defendant doctors' motions to dismiss premised upon the contention that Plaintiffs have failed to comply with the medical records release authorization requirement of O.C.G.A. § 9-11-9.2 has been foreclosed by the Court of Appeals' recent holding in *Northlake Medical Center LLC v. Queen*, No. A06A0540 (Ga.Ct.App. July 13, 2008).

Plaintiffs' motion for protective order (filed May 26, 2006) shall be, **and hereby is DENIED as MOOT.**

This the 28 day of July, 2006.

/s/ Gail C. Flake
JUDGE GAIL C. FLAKE
DEKALB SUPERIOR COURT,
Division IV
STONE MOUNTAIN JUDICIAL
CIRCUIT

cc: Frank J. Klosik, Jr., Alina A. Krivitsky, counsel for Plaintiffs
Thomas E. Lavender, III, counsel for Defendant CHILDREN'S
Robert G. Tanner, counsel for Defendants TROYER and KEYES
Lori G. Cohen, Darcy B. Coty, counsel for Defendants THOMSEN and GOWER
H. Andrew Owen, Steven Salcedo, counsel for Defendants BRAND and BLEACHER

IN THE SUPERIOR COURT OF DEKALB COUNTY

STATE OF GEORGIA

TIMOTHY AND ANDREA SPACHT, individually and as next friend of N.S., a minor child,	:	
Plaintiffs,	:	
vs.	:	
CHILDREN'S HEATHCARE OF ATLANTA, INC., DR. WENDY A. TROYER, DR. WILLIAM G. KEYES, DR. JAMES THOMSEN, DR. VERLIA GOWER, DR. THEODORE BRAND, and DR. JOHN BLEACHER,	:	Civil Action File No. 06CV-4104-4
Defendants.	:	

POST-HEARING ORDER ON DEFENDANTS' MOTIONS TO DISMISS AND ON PLAINTIFF'S MOTION TO SUPPLEMENT AFFIDAVIT

(Filed Dec. 22, 2006)

This is a "failure to diagnose" medical malpractice case. In Georgia, every action alleging medical malpractice must at the time of its filing be accompanied by "an affidavit of an expert competent to testify, which affidavit shall set forth specifically at least one negligent act or omission claimed to exist, and the factual basis for each such claim." O.C.G.A. § 9-11-9.1(a)

(2006). Failure to provide the requisite affidavit renders the plaintiff's case subject to dismissal on motion for failure to state a claim (*see* O.C.G.A. § 9-11-12(b)(6)), "except that the plaintiff may cure the alleged defect by amendment pursuant to Code Section 9-11-15 within 30 days of service of the motion alleging that the affidavit is defective," O.C.G.A. 9-11-9.1(b) (2006).[1]

On July 2, 2005, the Court entered an order denying in part and reserving in part Defendants WENDY A. TROYER's and WILLIAM G. KEYES' motion to dismiss (filed April 18, 2006) and Defendants JAMES THOMSON's and VERLIA GOWER's motion to dismiss (filed May 15, 2006):

> The question raised by the defendant doctors'[2] O.C.G.A. § 9-11-9.1 motions to dismiss is whether Plaintiffs' affiant, Dr. David L. Schwartz, is "an expert competent to testify" in their respective medical specialties and subspecialties.

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[1] Such Code section goes on to provide that "[t]he trial court may, in the exercise of its discretion, extend the time for filing said amendment . . . as it shall determine justice requires." O.C.G.A. § 9-11-9.1(b) (2006).

[2] As with its prior order on the motions to dismiss, the term "Defendant doctors" refers to the moving defendants Drs. TROYER, KEYES, THOMSEN, and GOWER. (Defendants Drs. BRAND and BLEACHER have not moved, nor have they joined in Defendant doctors' motions, to dismiss.) "Defendant hospital" refers to Defendant CHILDREN'S HEALTHCARE OF ATLANTA, INC., the only hospital defendant in this action.

. . .

> Review of the record and the parties' briefs regarding the various specialties and subspecialties involved provides the Court with insufficient information to determine whether Plaintiffs' expert Dr. Schwartz is in fact competent to testify against the doctor defendants in this case. As permitted by O.C.G.A. § 24-9-67.1(d), the Court will accordingly conduct a "pretrial hearing to determine whether [Dr. Schwartz] qualifies as an expert" competent to testify in this matter. Notice of such hearing date will be mailed separately to counsel, and the Court will reserve ruling on all unaddressed portions of the doctor defendants' motions to dismiss (and of Plaintiffs' responses thereto) until after such hearing. (Supp. 200[6]).

(Order, July 28, 2006, pp. 10, 14.)

Notice of the hearing data was duly provided to all parties by the Court in accordance with law on August 11, 2006, and this matter came on for hearing on September 21, 2006, with counsel for Plaintiffs, Defendants doctors, and Defendant hospital in attendance. None of the participating parties presented evidence or testimony at such hearing, and Plaintiff's expert did not appear. Prior to the hearing, however, Plaintiffs on September 18, 2006 filed their "Motion to Supplement Affidavit," which attaches as "Exhibit A" a supplemental affidavit from Plaintiff's expert executed on September 11, 2006 and which sets out

additional information regarding his qualifications as an expert "competent to testify" in this matter.

Plaintiffs' modest to supplement expert affidavit

Although the Court in accordance with Georgia law may exercise its discretion to consider an untimely supplement to an O.C.G.A. § 9-11-9.1 expert affidavit "as it shall determine justice requires," neither Plaintiffs' "Motion to Supplement" nor the evidence of record provides the Court with any basis upon which to do so. Pursuant to Section 9-11-9.1(b), Plaintiffs could have amended their expert's affidavit *as a matter of right* "within 30 days of the service of the motion alleging that the affidavit is defective." Defendants Drs. TROYER's and KEYES' motion challenging the sufficiency of such affidavit was served upon Plaintiffs by mail on April 18, 2006, and Defendants Drs. THOMSON's and GOWERS' motion on the same issue was likewise served upon Plaintiff on May 15, 2006, making any such amendment due to be filed no later than June 14, 2006.[3]

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[3] Although not abundantly clear, it appears that Plaintiffs are operating under the mistaken belief that they may amend their expert's affidavit as a matter of right at any time: "When an expert's affidavit is filed contemporaneously with the Complaint, a plaintiff is allowed to supplement the affidavit if its sufficiency is challenged." (Plaintiffs' motion, p. 1) (citation omitted). Despite the title of their motion, Plaintiffs do not cite to or acknowledge therein the relevant language of Section 9-11-9.1(b), do not request that the Court allow the amendment or exercise its discretion in their favor to allow the amendment, or

(Continued on following page)

But Plaintiffs did not attempt to amend such affidavit until September 18, and although they were aware that a hearing on this specific issue was set for September 21, served their motion and supplemental affidavit *by mail* upon defendants. Not surprisingly, none of the defendants received notice of or had an opportunity to review the supplemental affidavit until immediately prior to the 9 a.m. hearing (and even then did not obtain, their own copies thereof, having instead to "share" Plaintiffs' counsel's copy among three separate defense counsel) with the predictable result that none of the movants had the opportunity to argue or brief whether the affidavit as supplemented establishes that Plaintiffs' expert is "competent to testify" against the defendant doctors in this matter.

Noticeably absent from Plaintiff's motion and supplemental affidavit is any explanation for this delay. The affiant is Plaintiffs' expert witness, retained by Plaintiffs no later than February 2006, and the information about his qualifications with which he now supplements his original affidavit is not "newly discovered." To the contrary, whether or not such "expert" is properly qualified within the meaning of Sections 9-11-9.1 and 24-9-67.1 to provide an initial affidavit is an issue which the law charges

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contend that "justice requires" the amendment, nor do they interpose any request for relief other than "WHEREFORE, Plaintiffs respectfully request that the Court deny Defendant's Motions to Dismiss." (Plaintiffs' motion, p. 4.)

plaintiffs in professional negligence actions to inquire into *prior* to filing their complaint, which responsibility they ignore at their own peril.

When Plaintiffs' unexplained delay in filing their supplemental affidavit is considered in conjunction with the lack of notice to the defendants discussed above, it gives fair support to the implication that Plaintiffs' late filing of their expert's supplemental affidavit was intended not to assist the Court in ruling upon the substantive issues raised by the doctor defendants' motions to dismiss, but to prevent such defendants from being heard on the sufficiency of the supplemental affidavit as it pertains to Plaintiffs' expert's qualifications.[4]

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[4] That this was in fact Plaintiffs' purpose is bolstered by the fact that *no other avenue* for bringing such evidence before the Court could possibly provide plaintiffs with such an advantage. Had Plaintiffs amended their affidavit within 30 days of the motions to dismiss as O.C.G.A. § 9-11-9.1(b) permits, or moved the Court one or even two months later to permit supplementation of their expert's affidavit. Defendants would have had the opportunity to challenge the sufficiency of the supplemental affidavit *prior to or at the September 21 hearing on this issue*. Had Plaintiffs deposed their expert in order to submit his deposition testimony into evidence, Defendants would have had the opportunity to attend such deposition and cross-examine Plaintiffs' expert as to his qualifications *prior to the hearing on such issue*. Had Plaintiffs called their expert to testify, Defendants would have had the opportunity at the hearing to cross-examine him and to present their own witnesses or other evidence in rebuttal.

Defendants have not, however, filed any opposition to Plaintiff's motion to amend their expert's affidavit. Instead, on the day of and immediately prior to the hearing, Defendants GOWER and THOMSEN filed their own "expert" affidavits, wherein they opine that pediatric surgeons "do not have the same education, training, experience, or expertise in assessing complex airways to determine the etiology of an airway obstruction such as that evidenced in [N.S.]." (Affidavit of Verlia Gower, ¶ 16; Affidavit of James Thomsen, ¶ 18.) Plaintiffs have not moved to exclude these affidavits on any grounds.

Accordingly, the Court will grant Plaintiffs' motion to amend their expert affidavit, and will also consider all of the evidentiary materials of record as of the date of this Order in ruling on Defendants' motions to dismiss.

Plaintiffs' expert's affidavit – Before and After

Having found in its July 28, 2006 Order that Plaintiffs' expert's initial affidavit was insufficient as a matter of law to establish that such expert is "competent to testify" against the defendant doctors in this case, the Court examines the relevant changes[5]

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[5] It is important here to note that the Court has previously determined that the evidentiary material of record as of July 28, 2006, which includes Plaintiffs' expert's *original* affidavit, "provide[d] insufficient information to determine whether Plaintiffs' expert Dr. Schwartz is in fact competent to testify against

(Continued on following page)

effected by Plaintiffs' expert's supplementation and amendment of his affidavit, which changes are italicized below:

AFFIDAVIT OF
DAVID L. SCHWARTZ, M.D., F.A.C.S., F.A.A.P.

STATE OF NEW YORK
COUNTY OF _____

BEFORE ME, the undersigned officer duly authorized to administer oaths, came David L. Schwartz M.D., F.A.C.S., F.A.A.P., who after being duly sworn, states the following:

1.

My name is David L. Schwartz and I make this supplemental affidavit based on my knowledge, training, and experience as a skilled board certified pediatric surgeon. As a Pediatric surgeon, I operate on children whose development ranges from the newborn stage through the teenage years. I am primarily concerned with the diagnosis, preoperative, operative, and postoperative management of surgical problems in children.

2.

As a board certified Pediatric Surgeon, I have the training, knowledge, and experience to diagnose and surgically manage children

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the doctor defendants in this case." (Order, July 28, 2006, p. 14 of 15.)

with vascular rings, which is the medical condition at issue in this case. My knowledge and experience in diagnosing and surgically managing children with vascular rings was gained from my extensive medical training and experience. I gained my medical school training and degree [1960-1964] at Albert Einstein School of Medicine. I performed my Internship and surgical residency 1964-1970 at Bronx Municipal Hospital Center. I performed my pediatric surgery residency and fellowship 1972-1974 at John Hopkins Hospital. I am board certified in pediatric surgery. I am assistant clinical professor in surgery at Albert Einstein College of Medicine, 1974-present. I am a clinical assistant professor at New York University Medical Center, 1978-present, I am in private practice for pediatric surgery, B.S.K. Surgical Associates, P.C., 1974-present.

3.

Every day I cooperate with all of the specialists involved in a child's medical care to determine whether surgery is the best option for the child. I regularly cooperate with neonatologists and pediatric otolaryngologists to manage surgical problems in children. A child with a vascular ring must be diagnosed immediately by neonatologists and/or pediatric otolaryngologists and then they must refer the child to a pediatric surgeon so that the pediatric surgeon may immediately evaluate the child for surgical division of the vascular ring.

4.

> Based upon over thirty years of experience in diagnosing and surgically managing children with vascular rings and upon a review of the certified medical records from Children's Healthcare of Atlanta which reflects the treatment that Dr. Troyer, Dr. Keyes, Dr. Gower, and Dr. Thomsen gave to [N.S.], it is my opinion that Dr. Troyer, Dr. Keyes, Dr. Gower, and Dr. Thomsen failed to exercise that degree fo skill and care ordinarily required by the medical profession in general under like conditions and similar circumstances. I have identified the following specific acts or omissions in support of this opinion. . . .[6]

(Supplemental Affidavit of David L. Schwartz, ¶¶ 1-4) (filed September 18, 2006).

Statutory standard

Until recently, Section 9-11-9.1 and its interpreting case law provided the legal standard for evaluation of an expert witness' qualification in a professional malpractice action. On February 16, 2005, Code Section O.C.G.A. § 24-9-67.1 went into

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[6] The remainder of Dr. Schwartz' affidavit addresses with specificity the alleged negligent acts or omissions of the doctor defendants. (Schwartz Amended Aff. ¶¶ 4-5.) As this information is not relevant to the question presently before the Court, i.e., whether Dr. Schwartz is competent to testify as an expert against the doctor defendants, it is not quoted herein.

effect, codifying and statutorily clarifying the "expert competent to testify" requirement of O.C.G.A. § 9-11-9.1:

> (c) *Notwithstanding . . . any . . . provision of law which might be construed to the contrary*, in professional malpractice actions, the opinions of an expert, who is otherwise qualified as to the acceptable standard of conduct of the professional whose conduct is at issue, *shall be admissible only if, at the time the act or omission is alleged to have occurred, such expert*:
>
> > (2) In the case of a medical malpractice action, had *actual professional knowledge and experience* in the area of practice or specialty in which the opinion is to be given *as the result of having been regularly engaged in*:
> >
> > > (A) The *active* practice of such area of specialty of his or her profession *for at least three of the last five years, with sufficient frequency to establish an appropriate level of knowledge* as determined by the judge, in performing the procedure, *diagnosing the condition*, or rendering the treatment which is alleged to have been performed or rendered negligently by the defendant whose conduct is at issue; or
> >
> > > (B) The *teaching* of his or her profession *for at least three of the last five years* as an *employed* member of the faculty of an educational institution accredited in the teaching of such profession,

> *with sufficient frequency to establish an appropriate level of knowledge*, as determined by the judge, *in teaching others how to* perform the procedure, *diagnose the condition*, or render the treatment which is alleged to have been performed or rendered negligently by the defendant whose conduct is at issue; and
>
> (C) Except as provided in subparagraph (D) of this paragraph: (i) Is a member of the same profession; (ii) Is a medical doctor testifying as to the standard of care of a defendant who is a doctor of osteopathy; or (iii) Is a doctor of osteopathy testifying as to the standard of care of a defendant who is a medical doctor. . . .
>
> . . .
>
> (e) *An affiant* ***must*** *meet the requirements of this Code section in order to be deemed qualified to testify as an expert by means of the affidavit required under O.C.G.A. § 9-11-9.1.*

O.C.G.A. § 24-9-67.1(c-e) (Supp. 2005) (emphasis added).[7]

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[7] As with Dr. Schwartz' supplemental affidavit, only the relevant portions of the statute are quoted below. For example, the fact that Dr. Schwartz "was licensed . . . to practice his profession" is not in dispute in this case, nor is the fact that the teaching Institutions with which he is affiliated are "accredited." O.C.G.A. § 24-9-67.1(c)(1), (2)(B) (Supp. 2006).

Application of statutory requirements to Dr. Schwartz' supplemental affidavit

Under the law as it existed prior to the enactment of Section 24-9-67.1, more specifically the case law interpreting the expert affidavit requirements of O.C.G.A. § 9-11-9.1, Dr. Schwartz would almost certainly be considered an "expert . . . qualified as to the acceptable standard of conduct of the professional whose conduct is at issue. . . ." *Id.*; *see*

Section 24-9-67.1, however, requires more from a malpractice plaintiff than ever before in order for his O.C.G.A. § 9-11-9.1 expert to be deemed "qualified," and divides such experts into "practicing" or "teaching" categories. Compare O.C.G.A. § 24-9-67.1(c)(2)(A), (B) (Supp. 2006). As Plaintiffs' expert may qualify as either, the Court reviews both applicable standards under the new statute.

The "practicing" expert witness in a failure-to-diagnose medical malpractice must now not only be engaged in the practice of medicine, but the "*active* practice" of medicine, "for *at least* three of the last five years" relative to the data the alleged malpractice is claimed to have occurred.[8] *Id.* It is not enough that the plaintiff's expert be experienced in diagnosing the condition alleged to have been overlooked by

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[8] Based upon the allegations of Plaintiffs' complaint, the failure to diagnose N.' "vascular ring" occurred on or about March 12, 2002. (Original Complaint, ¶ 8; original Affidavit of David L. Schwartz, ¶ 2(A)).

the defendant, under Section 24-9-67.1, plaintiff's expert must now establish that he has done so "with *sufficient frequency* to establish an appropriate level of knowledge" to the Court. O.C.G.A. § 24-9-67.1(c)(2)(A) (Supp. 2006) (emphasis added).

By contrast, a "teaching" expert in a "failure to diagnose" medical malpractice action must establish not only that he is on the faculty of an accredited medical teaching institution, but that he is an "*employed*," not merely honorary, member of such faculty, that he has been so "for *at least* three of the last five years" relative to the date the alleged failure to diagnose took place, and more specifically, establish that he has been "teaching others how to . . . diagnose the condition" alleged to have been misdiagnosed by the defendants, once again "*with sufficient frequency* to establish an appropriate level of knowledge" to the Court. *Id.* (emphasis added).

Addressing the "teaching" basis for qualification first, while review of Dr. Schwartz' affidavit as supplemented[9] establishes that he is "present[ly]" a

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[9] The *only* evidence of Dr. Schwartz' qualifications as an expert in this case come from his original and supplemented O.C.G.A. § 9-11-9.1 "expert" affidavit, and the unauthenticated copy of his curriculum vitae attached as Exhibit "A" to Plaintiff's May 18, 2006 response to Defendants' TROYER's and KEYES' motion to dismiss. (The latter does reflect that Dr. Schwartz received an award for "Best Clinical Teaching" at N.Y. Hospital Medical Center in Queens, but that award was made in 1996.) The record contains no deposition transcript or other testimony relevant to his qualifications, and as noted above, Dr. Schwartz

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member of the faculty at both Albert Einstein College of Medicine and the New York University Medical Center, nothing therein indicates that he is or was an "employed" member of either faculty, that he was actually *teaching* at either institution as an employed faculty member, that he had so taught "for at least three of the last five years" relative to the date the alleged failure to diagnose took place, or most importantly, that he there has taught others to "diagnose the condition . . . which is alleged to have been performed or rendered negligently by the defendant whose conduct is at issue," *and* "with sufficient frequency to establish an appropriate level of knowledge" to the Court. O.C.G.A. § 24-9-67.1(c)(2)(B) (Supp. 2006).

In fact, Plaintiff's expert's affidavit(s), and the record itself, are completely silent when it comes to the time, place, subject matter and frequency of teaching by Plaintiff's expert. That being the case, Plaintiff's expert cannot be deemed competent to testify as a "teaching expert" against the doctor defendants in this case pursuant to O.C.G.A. § 24-9-27.1(c)(2)(B) (Supp. 2006).

Does Plaintiff's expert then qualify as a "practicing expert" under Section 24-9-27.1(c)(2)(A)? Dr. Schwartz' affidavits are certainly more specific as to the frequency of his medical practice: "*Every day* I

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did not appear and testify at the September 21 hearing on this matter.

cooperate with all of the specialists involved in a child's medical care to determine whether surgery is the best option for the child. I *regularly* cooperate with neonatologists and pediatric otolaryngologists to manage surgical problems in children." (Schwartz Supp. Aff. ¶ 3) (emphasis added). Certainly it appears that Plaintiffs have satisfied the "three of the last five years" practice requirement as their expert states he has "over thirty years of experience in diagnosing and surgically managing children with vascular rings . . ." (Schwartz Supp. Aff., ¶ 4); *see Canes v. Al-Jabi*, slip op. at ___ (Ga.Ct.App. Nov. 20, 2006).[10]

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[10] Kaminer and the Board contend that the trial court erred in finding that Sleasman, Milligan, and Shore, are qualified under O.C.G.A. § 24-9-67.1(c) to testify regarding the standard of care governing Kaminer's professional conduct because the witnesses are not regularly engaged in the active practice of Kaminer's specialty, pediatric cardiology. . . . Under the statute, it is the expert's qualifications, vis a vis the area of practice or specialty in which the expert is providing the opinion, rather than the defendant doctor's specialty or area of practice, that controls whether the trial court should allow the expert's testimony.

. . .

In this case, the trial court was authorized to find that Canas's experts are offering opinions in the area of practice or specialty of pediatric medicine.

As the trial court noted, for the previous five years, Sleasman has practiced in the fields of pediatrics, allergy and Immunology, and diagnostic and laboratory immunology; Milligan has practiced in the area of pediatrics, specializing in primary care; and Shore has practiced in pediatrics, specializing in infectious diseases. Thus, the record supported the trial court's finding that each of these witnesses has

(Continued on following page)

But Plaintiff's expert, and the record itself, is silent as to *when* within the last thirty years Dr. Schwartz has "diagnose[d] the condition" which the doctor defendants in this case are alleged to have wrongfully failed to diagnose – specifically, the "vascular ring." O.C.G.A. § 27-9-67.1(c)(2)(A) (Supp. 2006). As indicated by the previous discussion, it is no longer sufficient for Plaintiff's expert to testify simply that he has diagnosed this condition at some point in the past. Pursuant to Section 24-9-67.1, Plaintiff's expert must have made such a diagnosis *within* "the last five years" relative to the date of the alleged failure to diagnose *and* "with sufficient frequency to establish an appropriate level of knowledge. . . ." (Supp. 2006). As the Court is unable to determine from the record before it that Dr. Schwartz has made even *one* diagnosis of a "vascular ring" within five years of March 12, 2002, he cannot alternatively qualify as a "practicing expert" in this case. *Id.*

This finding is consistent with the September 21, 2006 affidavits of doctor defendants GOWERS and THOMSEN, wherein they testify that "pediatric surgeons do not have the same education, training,

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been actively engaged in the practice of pediatrics for at least three of the last five years with sufficient frequency to establish an appropriate level of knowledge concerning the practice of pediatric medicine. The trial court did not abuse its discretion in denying the motions to disqualify Cana's experts based on OCGA § 24-9-67.1(c).

Id., slip op. at 21, 22.

experience or expertise [as do pediatric otolaryngologists] in assessing complex airways to determine the etiology of an airway obstruction. . . ." (Gowers Aff., ¶ 16; Thomsen Aff., ¶ 18.) Indeed, it is consistent with Dr. Schwartz' *own* testimony in his supplemental affidavit:

> A child with a vascular ring *must be diagnosed immediately by neonatologists and/or pediatric otolaryngologists* and then ***they must refer the child to a pediatric surgeon*** so that the pediatric surgeon may immediately evaluate the child for surgical division of the vascular ring.

(Schwartz Supp. Aff., ¶ 3) (emphasis added). It thus appears that Dr. Schwartz' area of expertise exists not in *diagnosing* vascular rings, but with their surgical remediation *after* diagnosis by another, differently-qualified professional.

Plaintiffs strenuously argue that their expert need not practice in the same specialty or subspecialty as the defendant doctors to qualify as an "expert" pursuant to Sections 34-9-67.1 and 9-11-9.1, but this is not the import of the Court's holding. As with cases involving the qualifications of experts under O.C.G.A. § 9-11-9.1 decided prior to the enactment of O.C.G.A. § 24-9-67.1, the question presented here is one of "overlap." *Cotten v. Phillips*, 280 Ga.App. 280, 633 S.E.2d 655 (2006) ("Under the statute, it is the expert's qualifications, rather than the defendant doctor's specialty or area of practice, that controls whether the trial court should allow the expert's

testimony."). A plaintiff's expert in a medical malpractice case need not be a member of the same specialty or subspecialty as the doctor defendants, but his area of practice must relevantly "overlap" with that of the defendants, or he is not competent to testify against them. *Abramson v. Williams*, 281 Ga.App. 617, 636 S.E.2d 765 (2006); *Tucker v. Talley*, 267 Ga.App. 820, 600 S.E.2d 778 (2004). Subsections 3(A) and (B) of Section 24-9-67.1 may thus be viewed as the Legislature's codification of that "overlap" first recognized in the case law interpreting O.C.G.A. § 9-11-9.1.

By failing to make the showing required by either subsection (c)(2)(A) *or* (c)(2)(B) of O.C.G.A. § 24-9-67.1, plaintiffs have failed to show that their expert's medical practice "overlaps" that of the doctor defendants, and he is accordingly not qualified to testify against them.

Conclusion

While the dismissal of a medical malpractice case on a challenge to the sufficiency of the O.C.G.A. 9-11-9.1 expert's affidavit is not favored in the law, "only those individuals possessing like expertise, obtained through commensurate education or training, are competent to testify as to whether a professional defendant complied with or deviated from the applicable standard of professional conduct. . . ." *Harrell v. Lusk*, 263 Ga. 895, 896, 439 S.E.2d 896 (1994).

Despite being put on notice by the Court on July 28, 2006 that the record "provide[d] the Court with insufficient information to determine whether Plaintiffs' expert Dr. Schwartz is in fact competent to testify against the doctor defendants in this case," being given an opportunity on September 21, 2006 to introduce additional evidence on this issue, and the Court's consideration of Plaintiffs' supplement to their expert's affidavit despite its untimeliness, Plaintiffs have failed to submit evidence sufficient to establish that their expert witness, Dr. David L. Schwartz, is competent to testify against the doctor defendants in this case. O.C.G.A. §§ 24-9-67.1 (Supp. 2006), 9-11-9.1 (2006).

Accordingly, based upon the foregoing, Plaintiffs' Motion to Supplement Affidavit (filed September 18, 2006) shall be, **and hereby is, GRANTED**, and Defendants WENDY A. TROYER's and WILLIAM G. KEYES' motion to dismiss (filed April 18, 2006) and Defendants JAMES THOMSON's and VERLIA GOWER's motion to dismiss (filed May 15, 2006), *as reserved in part in the Court's July 28, 2006 Order,* shall be, and hereby are **GRANTED**.

This the 22nd day of December, 2006.

/s/ Joan F. Roach
JUDGE JOAN F. ROACH, by designation
DEKALB SUPERIOR COURT, Division IV
STONE MOUNTAIN JUDICIAL CIRCUIT

cc: Frank J. Klosik, Jr., Alina A. Krivitsky, counsel for Plaintiffs
Thomas E. Lavender, III, counsel for Defendant CHILDREN'S
Robert G. Tanner, counsel for Defendants TROYER and KEYES
Lori G. Cohen, Darcy E. Coty, counsel for Defendants THOMSEN and GOWER
H. Andrew Owen, Steven Salcedo, counsel for Defendants BRAND and BLEACHER

Court of Appeals

of the State of Georgia

ATLANTA, Nov. 29, 2007

The Court of Appeals hereby passes the following order:

A07A1531. TIMOTHY SPACHT, ET AL. v. WENDY TROYER, ET AL.

The above appeal was docketed in this Court on April 5, 2007 and assigned to the Second Division, Johnson PJ, Phipps and Mikell JJ. Because of a dissent within the Second Division, the case shall be decided by the Second Division, the Third Division and a seventh judge. (OCGA §15-3-1(c)(1)).

The Honorable Debra Bernes, Judge of the Third Division of the Court of Appeals of Georgia, has recused in the above appeal. Therefore, the Honorable Gary B. Andrews, Presiding Judge of the First Division of the Court of Appeals of Georgia, is hereby assigned to the Third Division for the purpose of determining the above appeal.

The above appeal was docketed as an April 2007 Term case in this Court and shall be disposed of by the Court on or before the conclusion of the September 2007 Term.

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta Nov. 29, 2007

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Clerk.

/s/ William Z. [Illegible]

Court of Appeals

of the State of Georgia

ATLANTA, DECEMBER 14, 2007

The Court of Appeals passed the following order

Case No. A07A1531

TIMOTHY SPACHT ET AL V. WENDY TROYER ET AL

Upon consideration of the motion for reconsideration filed in this case, it is ordered that it be hereby denied.

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta DEC 14, 2007

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Clerk.

/s/ William Z. [Illegible]

Court of Appeals

of the State of Georgia

ATLANTA, Dec. 14, 2007

The Court of Appeals hereby passes the following order:

A07A1531. SPACHT, et al. v. TROYER, et al.

Pursuant to Rule 37(g), the court does not deem it appropriate that the Motion for Reconsideration should be voted on by twelve judges. The "Motion for Full Court Review" is denied.

Court of Appeals of the State of Georgia Clerk's Office, Atlanta

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta DEC 14, 2007

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ William Z. [Illegible], *Clerk*

SUPREME COURT OF THE STATE OF GEORGIA

CLERK'S OFFICE

ATLANTA

Date: May 19, 2008

John Fox Daugherty
GREER, KLOSIK & DAUGHERTY
4651-A Roswell Road, N.E.
Atlanta, GA 303423048

Case No. S0 08C0714

TIMOTHY SPACHT et al. v. WENDY TROYER et al.

COURT OF APPEALS CASE NO. A07A1531

The Supreme Court today denied the petition for certiorari in this case.

All the Justices concur, except Hunstein, P.J., and Carley, J., who dissent.

Therese S. Barnes, Clerk

SUPREME COURT OF GEORGIA

Case No. S08C0714 Atlanta, June 30, 2008

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

TIMOTHY SPACHT et al. v. WENDY TROYER et al.

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

All the Justices concur, except Hunstein, P.J., and Carley, J., who dissent,

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I hereby certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Therese S. Barnes, *Clerk*